

**MINUTES  
ENERGY FACILITY SITE EVALUATION  
COUNCIL OF WASHINGTON**

**March 15, 2004 - Special Meeting**  
925 Plum Street S.E., Building 4, Room 308  
Olympia, Washington, 98501 10:30 a.m.

**ITEM 1: CALL TO ORDER**

CHAIR LUCE: The special meeting of the Washington State Energy Facility Site Evaluation Council will come to order. Today is Monday, March 15, 2004. Clerk, call the roll.

**ITEM 2: ROLL CALL**

**EFSEC Council Members**

**Community, Trade & Economic Development**  
**Department of Fish & Wildlife**  
**Department of Natural Resources**  
**Utilities and Transportation Commission**  
**Chair**

Richard Fryhling  
Chris Towne  
Tony Ifie  
Tim Sweeney  
Jim Luce

MR. MILLS: And there is a quorum.

**OTHERS IN ATTENDANCE**

**EFSEC STAFF AND COUNSEL**

Allen Fiksdal  
Mike Mills  
Shaun Linse, Court Reporter

Irina Makarow  
Ann Essko, AAG

**EFSEC GUESTS**

John Dodge – The Daily Olympian  
Charles Carelli – Independent Consultant

David Reich – Ecology

**ITEM NO. 3: EFSEC RULES**

CHAIR LUCE: The purpose of today's meeting, as specified, is to discuss our draft rules. The Council staff at our encouragement has taken the opportunity to go through the rules and make some changes, some consolidations. Brevity is to be desired. Clarity is likewise to be desired. So I thought Council staff could walk us through these changes. What I was going to propose is we start out with sort of an overview of the changes of consolidations and edits that you made and then maybe start with procedural standards and then see if we can work our way through

those maybe in 45 minutes. Less would be desirable. And then talk about the standards themselves. If that's agreeable to the Council members, then that's how we would proceed; otherwise, I'm willing to listen to any other suggestions. Okay. We will proceed accordingly. Allen.

MR. FIKSDAL: There are a couple of initial items. We have a regular Council meeting that starts at 1:30, so we haven't thought about bringing in lunch or anything. So we need to adjourn so you guys can go out and have lunch before the regular meeting. So let's watch our time so you guys have time to eat and I have time to eat.

I think a little history. As you recall this is almost a two-year process that started out with a study by the Governor's office and suggestion that there needed to be an update of our rules and standards needed to be developed for siting energy facilities. We had a Krogh effort where we had a stakeholder group that met for almost nine months, and as a result of that there were proposed rules that were submitted by the different stakeholders. Based on those, different Council members went through and looked at what they thought needed to be changed in the rules and submitted their versions or their suggestions. All of those were reviewed by the Council and essentially approved for displaying on our website by an action at a Council meeting. We put those on our website. We invited public comment. We held a few public comment meetings or hearings you might call them. We've received a lot of comments. The majority of the comments were in relation to the proposed CO2 rule that the Council had proposed to adopt. Subsequently, the legislature took up some legislation and ultimately passed House Bill 3141, and I think due to that, the Council should -- I can't recall if you've done this officially or not, but the CO2 rules would essentially be superseded by the legislation. So I propose that, and we did not include the CO2 rules in our package that we reviewed. I think those should be set on the table for a long time. The legislation does require EFSEC to go through rule making to implement the law, but I don't propose that you do that at this time. The new bill isn't a law yet until the Governor signs. It doesn't become effective until later. And I think you have enough on your plate right now with these rules rather than going forward with some new implementation of the CO2 rules. That's the suggestion. I don't know. You will have to decide what you want to do on that.

Then in the interim last year we received two new Council members, Chris Towne and Hedia Adelman. They went through the rules that the Council had developed that were on the website. They went through with a pretty extensive review of them. I think Chris did an excellent job of editing for clarity and spellings and word snipping. Hedia had many suggestions on many of the different rules on revising them, and she sent them out to the Council members. So what staff did is they took all of those rules that were on the website, the rules that had been edited with Chris and Hedia's suggestions, and went through each one and modified them as we thought appropriate and we sent these to you. We don't claim to have fixed everything. There are still some issues that need to be addressed I think. As with you, going through these after a while your eyes get a little blurry and your mind goes numb. And so we are looking for the Council members to help us finalize these rules. And that's the purpose of today's meeting is to go through these and see what you think.

So to begin with, Jim wanted us to suggest we start going through these rules from the beginning. Oh, I might say before we start, Hedia and Chris had suggested that we reorganize all of our rules into different parts and under each part would have a different chapter. The staff thinks that's a very good idea. We didn't organize it this way when we sent it out because it's easier just to go out in the order that it is now. But we highly recommend that it would be

reorganized into the different parts and whatnot. So we'll work on that. I think getting the words right is important, and then reorganization is just nothing but an exercise on the computer. So I think the part that Jim is talking about is our procedural rules, Chapter 06, 10, 14, 18, 26, 28, 30, 43, 34, 50, and 58. I don't think that staff made very substantive changes to those rules. We may have modified them slightly for clarity. I don't know if it's worth going through each one unless you have a question about these. They are mostly procedural. I think in 06 most of the changes we went through with the Council earlier had many suggested changes I think that most people have seen all of those, so I'm not going to go through those unless you have a question. Ten (10) we forgot to pass out to you, but I think there's a copy on the table. Basically there's an addition of four definitions in the definitions. That's not anything spectacular. In Chapter 14, I think this is, again, this is just –

MR. SWEENEY: Can we ask questions now?

MR. FIKSDAL: Sure. Go ahead.

MR. SWEENEY: Oh, I was jumping ahead. Its 14 now.

MS. TOWNE: I have a problem on the last page of 14, top of the page.

MR. SWEENEY: Thank you. That's the question.

MS. TOWNE: The sentence got garbled. I think it should read, "The Council will conduct," so you want to delete "will do."

MR. FIKSDAL: Right.

MS. ESSKO: Where are you?

MR. SWEENEY: Top of page.

MS. TOWNE: Page 3 of 14.

MS. ESSKO: There's an issue on 14, if you go back to 020. Let me just say, do you want my comments as we go through this? Not the detailed ones, but there are some issues in some of the rules that I've never been asked to look at that I think are big enough at least to bring to your attention, and then you can tell me what you want, if anything, from me.

MR. FIKSDAL: Sure.

MS. ESSKO: Is that all right? If you go back quickly to 020, you'll see that it talks about Council action will be based on the policies and premises of 010 (1), (2), and (3). Now if you actually go back and look at 010, Sub 1, Sub 2, and Sub 3 are only about half of that statute because there's a finding section that isn't numbered. There's a policy section that isn't numbered. There's a prologue to the intent section, and then one, two, and three are --

MS. TOWNE: Premises.

MS. ESSKO: Yes. My question is whether you want to omit the reference to 1, 2 and 3, so that your actions can be based on the policies in 010 period?

MS. TOWNE: So moved. I agree.

CHAIR LUCE: That would be fine.

MR. FIKSDAL: So we omit the (1), (2), (3).

MR. SWEENEY: Basically we refer to the whole subsection, not just subsections.

CHAIR LUCE: Anybody have any changes on definitions? What I'm going to do is I'm going to start plowing through these things.

MR. FIKSDAL: I guess if that's the case, if we don't have any objections or changes, the ultimate goal is to get something to place on the website to say this is where we are now, and we plan to go forward from that point.

CHAIR LUCE: I don't have any changes on 010 myself. Okay.

MS. ESSKO: I have one short one in 06. If we can go back to 06 for a minute. If you look at 463-06-020 it talks about, in Subsections 2 and 3, the role in which the Council members act. One of the issues that we grappled with in the disqualification orders was the fact that the Council members act in different roles depending on whether dealing with adjudication or not, and when they're dealing with adjudication they are not acting as representatives of the member agencies. So I would like to suggest that Subsection 2, the first sentence be modified to mimic what the statute says, so it would say, "The voting membership of the council consists of the directors, administrators, or designees of agencies listed in 80.50.030."

CHAIR LUCE: That's fine.

MS. ESSKO: Under (3) (b) there's the same issue and also an additional issue. I think this rule may have been drafted way early on when the chair was not a voting member. And so it said, "If you're appointed by one of the agencies and you're made the acting chair, you can still vote." And it also has the same problem talking about what are the agencies' responsibilities, which sometimes in adjudications the Council members are not carrying out responsibilities to the agency. So I'm suggesting that you might want to say, "The acting chair shall remain entitled to vote on any proposed Council actions and shall continue to fulfill his or her responsibilities under 80.50.030, Sub 3 through Sub 5." That just references you back to the statute, and you can decide at some later date what those responsibilities are, whether they're to the agency or to the Council.

CHAIR LUCE: That's fine.

MS. ESSKO: One thing to note, and I don't think this is worth spending a lot of time on right now. This assumes, this begs the question of what happens if the Port representative is appointed the acting chair because the Port representative is not a voting member. But I don't think that's a big enough deal to take time with today.

CHAIR LUCE: I wouldn't worry about it today or tomorrow either.

MS. ESSKO: Right.

CHAIR LUCE: I had just a super nit in council office business. "The Council office is located at." Will it be forever? I don't think so. I don't know so. Currently located. You've got a Post Office Box, so that's fine. 030. I'd just insert "currently located" or at least think about it. That's totally nonsubstantive, but five years from now we may not be here in the same spot. Then I had one on 463-06-090. I don't like adverbs or adjectives unless they're really critical, so I would say, "The Council staff shall provide assistance to help persons" or just "assistance to persons requesting records." With "the fullest," then somebody is going argue, well, you really didn't do it fullest way, staff. It could have been done better. And that's it. 463-14 WAC, Need for Energy - Legislative intent binding, I had a comment there. "RCW 80.50.010 requires the Council to recognize the pressing need for increased energy facilities." I would insert "accordingly the question of need for energy facilities is not an issue in Council proceedings or Council adjudicative proceedings."

MR. FIKSDAL: Well, this whole thing is interesting in that now if we have a standard, do we need this section at all? Or if you're going to adopt this need standard do we need this legislative intent or do you just even need it?

MR. IFIE: It is a repetition.

CHAIR LUCE: Let's defer that until we talk about the standard then. Ann, I think your change in RCW 50.010, that's good. Public meetings, blah-blah. Let's see. Line 51.

MS. TOWNE: Where are you?

MR. FIKSDAL: 030.

MS. TOWNE: Oh, I'm sorry. Yes.

CHAIR LUCE: 030, Line 51. The Council "shall" instead of "encourage that," I would say "limit public testimony at this hearing specifically to the issue of consistency." That is what it's about.

MR. SWEENEY: I would agree.

CHAIR LUCE: I would delete encourage that. This is a public meeting about land use consistency.

MS. TOWNE: No.

CHAIR LUCE: Yes it is.

MS. TOWNE: No, it's everything.

MR. FIKSDAL: It's an application review.

MS. TOWNE: Of all its public meetings and hearings during reviews of application, so it covers the waterfront.

CHAIR LUCE: Well, here's the sentence preceding it. "If the proposed site is located in more than one county..."

MR. FIKSDAL: Yes, this section is about the consistency hearing. The first one is about the public informational meeting.

CHAIR LUCE: That's wide open, but on the consistency hearing the testimony ought to be about consistency.

MS. TOWNE: Oh, in Sub 2.

CHAIR LUCE: Right, Line 51.

MS. TOWNE: Okay.

MR. FIKSDAL: The Council shall --

CHAIR LUCE: "Shall limit public testimony at this hearing to the issue of consistency and compliance with city, county, or regional land." That is what the hearing is about, and any other hearing, public hearing, they can say anything they want to. But on this particular hearing its land use.

MS. ESSKO: I think that's good.

MR. FIKSDAL: Shall limit?

CHAIR LUCE: Shall limit public testimony at this hearing to the issue of consistency and compliance.

MR. FIKSDAL: Okay.

CHAIR LUCE: And if some future Council Chair wants to waive that rule or the Council ends up letting more in, then so be it. But that ought to be the goal. Next change I was going to suggest is a deletion in adjectives. 463-14-080, on Page 4, at Line 4, "the council will conduct" and I would delete "an extensive public hearing." I don't know if it's going to be extensive or not. We'll conduct a public hearing.

MS. ESSKO: Yes.

MS. TOWNE: Where are you, 080?

MR. FIKSDAL: 080(1).

MS. TOWNE: Sorry, yeah.

MR. FIKSDAL: The Council will conduct a --

CHAIR LUCE: A public hearing.

MS. TOWNE: Yes.

CHAIR LUCE: 463-14, and I'm not sure about this, but Council overhead costs is currently an issue.

MR. FIKSDAL: Right.

CHAIR LUCE: You might say, and this is just a suggestion. I would like to hear staff's thoughts on this and Council members. Under RCW, Line 21, 80.50 and Chapter 463 WAC will be equitably allocated and charged.

MS. TOWNE: Oh, nice.

MR. SWEENEY: It's an adverb.

CHAIR LUCE: But it's not an expansive one. This is what I think you do anyway, but it also will allow us.

MS. ESSKO: I have a comment on 080 in general. I'm wondering if it can't be cut down in size substantially. My first comment has to do with Page 2, the very bottom of 080 on Page 2, where it says the deliberative process will determine compliance with the intent and purpose of 463-42 which is the application chapter. My understanding is your deliberative process considers a whole lot more than just the application chapter. It considers SEPA. It considers what you've heard in the land use hearing. It considers what you've heard in the public information hearing. It considers what went on with the environmental permitting, and it considers what you got in response to your media solicitation in 463-30-090. Hold that thought for a minute. When you go on to Subsection 1, there's a lot about public testimony, evaluating public comments. I'm wondering if that can't be consolidated down to just a brief description that you'll have a public hearing along the lines of Jim's edit of that first sentence and just leave it at that.

CHAIR LUCE: I think you could consolidate it. I think, however, it's helpful sometimes to be a little bit fuller in your description as long as it's not hurting, so that members of the public when they pick it up will have a better understanding really in the sense of educating the public as to the nature of the adjudicative proceeding and what we're going to hear. As long as it's not –

MS. ESSKO: I agree, Jim. Let me just ask folks this. The first sentence on that page says, "The Council will conduct a public hearing as an adjudicative proceeding for the presentation of evidence on the application." Do you folks think you then need the second and third sentences?

CHAIR LUCE: The only reason is presentation of evidence, take public testimony concerning -- I don't see the harm. No harm, no foul.

MS. ESSKO: I don't necessarily disagree.

MR. FIKSDAL: So let's go back here on the bottom of Page 2. Your suggestion, Ann, is delete that last sentence in order?

MS. ESSKO: It seems to me that the guts and feathers of this whole section is to tell the public how you're going to make a decision, and that is in the very last sentence of the rule. The Council when fully satisfied, when all issues have been adequately reviewed, will consider and by majority decision will act on the question of approval or rejection of the application.

MR. FIKSDAL: We have a rewrite evidently of that section.

CHAIR LUCE: Let's wait until we get the rewrite. Equitably allocated, is that all right?

MS. TOWNE: Yes.

MR. IFIE: I like that.

CHAIR LUCE: Let's go ahead and then come back.

MR. IFIE: I have a comment.

CHAIR LUCE: Yes, please.

MR. IFIE: On 050, preemption.

CHAIR LUCE: 050, preemption. All right.

MR. IFIE: Where it talks about Chapter 80.50 RCW operating as a state preemption of all matters relating to energy facility sites. Chapter 80.50 RCW certification is given in lieu of any

permit, certificate, or similar document which might otherwise be required. I suggest putting state before permits, so it will signify that we are preempting state permits and not federal. There is no preemption on federal permitting, just state preemption.

MR. FIKSDAL: By state or local governments?

MS. ESSKO: There is a preemption of federal permits when the federal permits can be delegated to the state, so your point is well taken, but the one issue is what do you do about the NPDES permits?

MS. TOWNE: And the PSD.

MS. ESSKO: Right. Right. Which are federal permits that the state just happens to be able to issue.

MR. IFIE: I wonder if preempting those, they have been delegated to EFSEC, is complying with federal permits? So the issue is not EFSEC is not preempting federal permits. In other words, I won't comply with the conditions of NPDES that the federal EPA will have issued. I don't know. I was just struggling with the fact that --

CHAIR LUCE: Suggestion. I would say it's implied. My concern about putting the word state in there is that we can't anticipate all of the scenarios, and if you put state in there, then that is definitely a limiting language. So I just can't visualize the future nor can I visualize the hypothetical. But I know that if you put state in there, somebody is going to come up with an argument that it's only state, and that I don't think is what we intend.

MR. IFIE: I follow your argument. The first sentence it talks about state preemption. So are you suggestion that state preemption would limit the preemption?

MS. ESSKO: It would depend upon to what extent federal law rules have been delegated to us, but RCW 80.50 only does for state.

MR. FIKSDAL: State and local.

CHAIR LUCE: State and local. Okay.

MR. IFIE: So I guess the issue there is what is state preemption? It's not defined any further.

CHAIR LUCE: Why don't we say state and local because that's what the statute says.

MR. FIKSDAL: At the end of the sentence. So that would be the second sentence, "Chapter 80.50 RCW certification is given in lieu of any permit, certificate, or similar document which might otherwise be required by state and local governments."

CHAIR LUCE: Right.

MS. TOWNE: I have another question on that rule, the poor little section. Preemption of all matters relating to energy facility sites.

MR. FIKSDAL: That's what the law says.

MS. TOWNE: I know it does, but is it clear that it also extends to operation, noise, air emissions, waste water discharges? I know siting is what we're called and I know that's what the certificate is, but it seems to limit it to one piece of what we do.

CHAIR LUCE: In other words, a chunk of real estate.

MS. TOWNE: Yes, and where you put it.

MR. FIKSDAL: We actually regulate all the activity on that site.

MS. TOWNE: Yes. Well, maybe that can be read broadly. Okay. It doesn't matter.

CHAIR LUCE: Now, Irina, you have a rewrite here.

MS. MAKAROW: Yes, I think this was what we had posted.

CHAIR LUCE: Let's take a chance to look it over here. It looks good to me. It's kind of extensive, but other than that, I think it works.

MS. ESSKO: This is really helpful, and it goes a long way toward solving the issues I was concerned with. I am wondering if you might like it better if Sub 1 says, "Evaluate an application to determine compliance with Chapter 80.50 RCW and Title 463 WAC."

MR. FIKSDAL: Okay. Say that again. Evaluate the application to determine the compliance -- do we have the intent and purpose?

MS. ESSKO: I'd just say Chapter 80.50 RCW and Title 463 WAC, then you can look at anything you want to that's in either document. Since Sub 5 covers public testimony, I'm wondering if Sub 4 could just say conduct an adjudicative proceeding for the presentation of evidence on the application.

CHAIR LUCE: That would be fine.

MS. ESSKO: Sub 6 talks about public comments received as part of the environmental review, and that's correct as far as it goes. But you also request public comments at the land use hearing, public information hearing, and just in general under 463-30-090.

CHAIR LUCE: Good point. How about just put a period after received?

MS. MAKAROW: Should we put "consider" instead of "evaluate?"

CHAIR LUCE: Right.

MS. ESSKO: Yes. Do you want a catchall No. 8 that allows you to consider any other pertinent information?

CHAIR LUCE: Okay. Good. The next section is 463-18. At least that's the one I've got in front of me now. Any changes on that? Any recommendations?

MR. SWEENEY: We are in that whole chapter?

CHAIR LUCE: 463-18 Procedure for Council meetings. I didn't have any changes. I thought it worked pretty well.

MS. ESSKO: In 120 do you really conduct all business by motion and all motions by voice vote?

MS. TOWNE: Wait a minute. Where are you? Are you in Chapter 18?

MS. ESSKO: 18-020.

MS. TOWNE: Oh.

MS. ESSKO: There's nothing wrong with the drafting. I just wasn't sure if all business really was transacted by motion, all motions by voice vote.

CHAIR LUCE: All Council decisions?

MS. ESSKO: Yes, and modifying agenda by motion. I just couldn't remember if that's how you did things.

CHAIR LUCE: All Council decisions shall be transacted by motion. Allen, you're looking a little puzzled there.

MR. FIKSDAL: Well, I'm trying to think of -- it depends on what you're calling decisions. Is it every decision that you make there has to be a motion? There are sometimes consensus decisions. There are other types of smaller not as significant as other decisions that are made.

MS. TOWNE: Decisions is more limiting than business.

CHAIR LUCE: It's narrower.

MR. FIKSDAL: So business can be --

MR. IFIE: All major Council --

CHAIR LUCE: Then you get into what's major, like a major environmental impact. Why don't we say all council decisions shall be transacted by motion because it's final decisions?

MR. IFIE: Are we just following along with what Allen was saying? There are some minor decisions that are made that don't have it.

MR. FIKSDAL: There are decisions, but there's other business that's conducted that doesn't have to be by motion.

MS. TOWNE: Where are we going to have the next meeting or you want to shift the time or what's for lunch?

MR. FIKSDAL: Those are Council business not decisions.

MR. IFIE: Okay.

MR. FIKSDAL: Is there something to change?

CHAIR LUCE: All council decisions shall be transacted by motion.

MR. FIKSDAL: Which number are we talking about?

CHAIR LUCE: No. 2, Line 35, all Council decisions.

MR. FIKSDAL: All Council decisions.

MS. ESSKO: Under 4(b), the Chair or any Councilmember may modify a meeting's agenda by motion. First, do you really want to do it by motion? Second, that's kind of an odd sentence because it could be read to mean that Jim can modify the agenda.

CHAIR LUCE: That's great.

MS. ESSKO: But then it says by motion which assumes it has to be voted on, so it's a little ambiguous.

CHAIR LUCE: Well, fine. Okay. It is ambiguous. Why don't we delete by motion?

MS. TOWNE: How about "the Council may modify a meeting agenda by motion?"

CHAIR LUCE: That's fine.

MR. FRYHLING: In the past at almost every meeting we've modified the agenda, and I don't think we've done it by motion.

CHAIR LUCE: The normal way this works in my experience is that Mike prepares an agenda, he shares it with Allen and Irina, and then they share it with me. And that's often done on Monday at around 11:00 a.m. for a 1:30 p.m. Council meeting. And then as you remember at the start of each Council meeting we go over the agenda, and we say, "Do Council members want to make any additions, deletions, corrections, or otherwise?" So the only thing I would say is this is a super nit, but I would like to be able to have the Chair, whoever it is, work with Mike and Allen and Irina in preparation of the agenda. And then like I said, we change the agenda according to what the Council members want. But I wouldn't like to say, no, you can't touch that agenda.

MR. FRYHLING: No, but what you've done about every meeting is you have changed the agenda based on who's on the telephone.

CHAIR LUCE: Right.

MR. FRYHLING: The item that's on the telephone may be the eighth item on our agenda. Well, instead of taking it at No. 8, we've changed it to No. 1. I'm just saying it's almost something we do every meeting.

CHAIR LUCE: Well, let's just delete (b). Council manager shall prepare each meeting's agenda in consultation with the Chair. Or if you wanted a (b), you could say the agenda may be modified during the course of the meeting by Councilmember request.

MR. FRYHLING: I don't have anything wrong with by motion, but we haven't done it by motion in the past. We just say we're going to take Item 8 as the first item.

MR. FIKSDAL: Everything you want to do, do you want to have a motion?

CHAIR LUCE: No, I don't because we won't do it. So do you want to delete by motion on (b)?

MR. FRYHLING: Sure.

MR. FIKSDAL: Yes.

MS. ESSKO: So the Council may modify a meeting's agenda, period.

MR. FIKSDAL: Yes.

MS. TOWNE: Page 2, Line 13, the RCW is wrong. I think the period is just misplaced. It's 42.30.075 I think.

MS. ESSKO: Tell me again where you are.

MS. TOWNE: Page 2, Line 13, at the end of the line the RCW cite. I think it should be 42.30.075.

MR. FRYHLING: There's two zeros in it.

MS. ESSKO: You know what? Since the Council acted to not have its meeting set out in rule, remember you --

MS. TOWNE: We're not following this; are we?

MS. ESSKO: Well, no. This was drafted while your rule still said you have two monthly meetings, then eliminated that rule. You no longer have any regular meetings at all. All your meetings are now special meetings.

MS. TOWNE: So we have to rewrite this whole section.

MS. ESSKO: Yes.

MR. FIKSDAL: Just get rid of monthly.

MS. TOWNE: Well, it's the regular that's changed.

MS. MAKAROW: Can you run that by us again.

MS. ESSKO: Yes. Regular meetings means recurring meetings held in accordance with a periodic schedule declared by statute or rule. As far as I know you now no longer have a statute or rule that says when your meetings are, so you no longer have regular meetings under the Open Public Meetings Act. All you have are special meetings.

CHAIR LUCE: Okay. Here's a suggestion. Other than executive sessions on 1, Line 8 the Council's meetings are open to the public, and then on 2 and 10 do the same thing. Delete, strike "regular meetings." Portions of the agendas of the Council's meeting, strike monthly, may fall within blah-blah. Wouldn't that do it?

MS. ESSKO: Read that again, Jim.

CHAIR LUCE: On Line 8, Item 1, other than executive sessions the Council strike "regular," strike "special" for that matter. Just the Council's meetings are open to the public.

MS. ESSKO: Gotcha. Okay. Got that one.

CHAIR LUCE: And then on two, strike "regular meetings." Portions of the agenda of the Council's meetings strike "monthly" may fall within the scope of the blah-blah-blah.

MS. ESSKO: What about the agenda? There are no regular meetings. How about if we just eliminate that whole sentence?

CHAIR LUCE: Right.

MS. TOWNE: We don't fix the time and place of these regular meetings.

MR. FIKSDAL: Yes, we do.

MS. TOWNE: Well, they're not regular anymore.

MS. ESSKO: Let's take out that first sentence, and then the second sentence take out the word "regular."

MS. TOWNE: Of its meeting. Instead of "these regular" insert "its."

MS. ESSKO: Yes. And then take out after the phrase each year.

CHAIR LUCE: You mean Line 13?

MS. ESSKO: Yes, take that out. So it reads, "The Council shall fix the time and place of its meetings and publish the schedule in the Washington register on or before January of each year."

MR. FIKSDAL: Period?

MS. ESSKO: Yes. Notice of any change from such meeting shall be published at least 20 days. Now let me look at the cancellation section of the Open Public Meetings Act.

CHAIR LUCE: I would just say treated as adjournment period.

MS. TOWNE: Then the special meeting section doesn't make sense either.

MS. ESSKO: That's the next point.

CHAIR LUCE: Delete special meeting section.

MS. ESSKO: Yes. Because your meetings are all --

CHAIR LUCE: Special.

MS. ESSKO: But what you could do if you want to have a rule that's -- you can take what's currently in Section 2 and add that as an addendum to Sub 3, so it's clear that you're doing special meetings under the Open Public Meetings Act, and you're following those procedures. And then you can have a subset that says in addition to the requirements of the Open Public Meetings Act for special meetings, here's additional things we're going to do. We are going to publish this stuff in the register.

CHAIR LUCE: Okay. Can I make a suggestion? We let Allen and Ann work that out, and the work out will be consistent with what we just discussed, basically consolidation.

MS. ESSKO: One other thing that Allen and I will think about and get back to you with is the issue of what happens as written. You need to tell the public whether or not you're going to call meetings that you didn't publish in the state register. I'm assuming you want the freedom to be able to do that. Allen and I will figure out some way to say that. Notwithstanding the fact that we're going to publish stuff in the state register, the Council could still have a special meeting separately from those.

CHAIR LUCE: Are we delegating to Allen and Ann to do this, so we don't have to come back and reevaluate?

MS. TOWNE: Yes.

MR. SWEENEY: Yes.

MR. IFIE: Yes.

MR. FRYHLING: Yes.

CHAIR LUCE: I didn't have anything else on that chapter because everything else got struck. APA, that's a new section now. That's fine. 463-22 WAC, comments? I had one on 030, Potential Site Study - Fee. I think it's consistent. An initial fee of \$10,000 shall accompany the study request.

MR. SWEENEY: I have a question about these meetings versus the meeting required under 80.50.090 which is what you call the informational public hearing. In our last section in this chapter we talk about a meeting, a public information meeting on the potential site study. Is that the same meeting as -- it is not the same meeting.

MR. FIKSDAL: No. It's only after you receive an application for a site. A potential side study is not an application for site certification.

MR. SWEENEY: Okay.

MR. FIKSDAL: The law RCW 80.50 only requires an informational public meeting after you receive an application for site certification. It doesn't say anything about public meeting for a potential site study. This is something we're inventing.

MR. SWEENEY: Okay. In terms of the scheme of things a potential site study comes before or after?

MR. FIKSDAL: Before an application.

CHAIR LUCE: It's like a preplanning.

MR. SWEENEY: Okay.

CHAIR LUCE: Any other questions, comments, changes on 463-22? Moving on to 463-26, anybody have anything on that?

MS. ESSKO: Hold on.

MS. TOWNE: Yes, on 010. You have informational meetings as described in 130, but there isn't a 130 now or not here anyway.

CHAIR LUCE: You just want to circle the WAC, then we'll fix that with whatever the WAC cite is.

MS. TOWNE: I can't remember where we put it.

CHAIR LUCE: Well, neither can I, but we can defer that until later. Just circle the WAC cite. The point is to make sure we get the correct WAC cite.

MS. TOWNE: Right.

MS. ESSKO: I have a question on 040, a policy question. My recollection is that the statute does not require that the land use hearing be an adversarial proceeding. Do you really want it to be one? My recollection is -- let me make sure. Hold on just a second.

CHAIR LUCE: If it's not, let's not make it so.

MS. ESSKO: Hold on. This is the initial land use consistency hearing, correct me if I'm wrong. This is not a later preemption hearing. This 040 is the initial land use hearing where the county or the local government can come in and say it's consistent or not.

MR. FIKSDAL: This 040 we are deleting the initial. It says the public land use hearing under 090(2). It's not the initial. It's all one now; isn't it? You hold a land use hearing and then --

MS. ESSKO: But it's separate from the preemption hearing. This refers to what we already had in Kittitas Valley, not the thing we haven't had yet.

CHAIR LUCE: Right.

MS. TOWNE: If you look at the statute, go back to 090, and Sub 3 says we have to hold a public hearing conducted pursuant to APA. Sub 2, which is the land use part, doesn't have those magic words; therefore, my presumption is it doesn't require an adjudicative proceeding under the APA. That's how I read 090 in the statute.

MS. ESSKO: Exactly right. And the definition of adversary proceeding is one having opposing parties, and in that early stage we didn't even have parties.

MR. FIKSDAL: If you don't want it, that's okay. This is left over from whenever.

CHAIR LUCE: Let's get rid of it. Shall be conducted -- what would be your language, Ann?

MR. FIKSDAL: Just take out the section, "if it's not an adversarial," the whole thing, just delete the section.

MS. ESSKO: Yes.

CHAIR LUCE: Delete the section.

MS. ESSKO: I just have a drafting question. I'm puzzled in 050. It looks like the references to 35.63 and 35A.63 they're underlined as if they're new, but those were in the original version of the rule, right?

MR. FRYHLING: Why don't we add 36.70A?

MS. TOWNE: It's there. That existed.

MR. SWEENEY: 36.70A?

MS. TOWNE: Oh, no, because the statute doesn't authorize it. That's what I've been whining about for eight months.

MR. FRYHLING: I know.

MS. ESSKO: But the point Dick raises is the one I was going to raise over in 26-100. Do you want the GMA in or out?

MS. TOWNE: I don't think we can put it in because the law doesn't.

MS. ESSKO: The only way you can put it in, is something we talked about recently, is in 80.50.100 where it talks about what has to be in the recommendation to the Governor, and it says the Council has to include conditions to recognize the purpose of laws or ordinances or rules or regulations promulgated thereunder that are preempted or superseded. So that's what you can hang your hat on maybe to deal with GMA.

CHAIR LUCE: Let's leave it out.

MS. MAKAROW: I think here we were just repeating the actual definition that's given in the RCW for what is a zoning ordinance. We have a definition for zoning ordinance.

MS. TOWNE: It's in 020 of 80.50.

MS. ESSKO: You can still get to it this way. I just wanted to raise the issue. This raises the GMA issue.

MR. FRYHLING: We went to Kittitas County, and we made a determination that they weren't in compliance. But we are making a determination they weren't in compliance of an act that's not part of this act.

MS. TOWNE: We don't even know whether they adopted it under 36.70A and 36.70 as did Whatcom. Whatcom used double standards; therefore, the problem didn't arise as I read it. But I don't even know in the Kittitas case.

CHAIR LUCE: Going, going, gone. This is consistent with the statute as it's written, so let's just leave it like that.

MS. ESSKO: One other detail. If someone can go through and make sure that the magic words are "land use plans" and "zoning ordinances."

MS. TOWNE: Not or but and.

MS. ESSKO: I'm sorry, and. Just because you kind of use a different version up here. So it can always say land use plans and zoning ordinances. That would be swell.

CHAIR LUCE: Great. That one is done. 463-30 WAC, Procedure for Adjudicative Proceedings. I have a question on 463-31-100. You discussed the fact that attorneys at law are qualified and an officer or employee seeking party status. Does the Sub C at Line 26 on Page 4, 463-30-100, does the Sub C address the issue of pro se?

MS. TOWNE: I looked at that too. The lead-in is the following persons may appear in the representative capacity, and I suppose a pro se is a representative of him or herself; therefore, should be listed.

CHAIR LUCE: I am thinking about Connie. God bless her wherever she is.

MS. ESSKO: The purpose for this section is to make sure that you don't have a representative who is clueless and screws over the person they're representing. So you can come in on your own behalf and screw yourself over if you want as pro se.

CHAIR LUCE: So you don't see it as a big issue.

MS. ESSKO: I don't see a big issue.

CHAIR LUCE: Then let's leave it alone.

MS. ESSKO: Can we go back to 020 for a minute? This 020 raises the issue that we dealt in the adjudicative proceeding about -- Let me just pass out something here, -- who the presiding officer is, and I'm wondering what you think about what I'm handing out to clarify where I think the Council is right now on the issue.

MS. TOWNE: This arose in the context of Adam's most recent prehearing order and whether he was presiding officer for all purposes or limited purposes of disclosure.

MS. ESSKO: It also arose in BP. I sent out an email to folks. But it arose with the issue if less than full Council shows up at a prehearing conference.

MR. FIKSDAL: So, Ann, you're suggesting substituting what you handed out for that whole section?

MS. ESSKO: Yes.

CHAIR LUCE: And the difference is?

MS. ESSKO: My version makes it clear that the Council is the presiding officer under the APA, the one that makes the decision. The existing 020 doesn't make it clear, and I think is out of compliance with EFSEC's statute which is, it's EFSEC that does the adjudicative proceedings.

CHAIR LUCE: Why couldn't you just say the Council is the presiding officer during adjudicative hearings pursuant to blah-blah and may utilize an Administrative Law Judge for purposes of conducting the hearing?

MS. ESSKO: Because I think that's a little ambiguous because it sounds like the ALJ can make the decision.

CHAIR LUCE: I didn't think so.

MS. TOWNE: Here it specifies limits to facilitating conduct of the hearing rather than deciding.

CHAIR LUCE: Comments, Allen?

MR. FIKSDAL: I think in the past the reason you had this is the Council did appoint a presiding officer and that presiding, like many local governments, ran the hearing, and I think this is a remnant of that. Now whether the Council wants to change forever the Council is the presiding officer, and you know according to Ann's interpretation of law, that's fine. Whatever you want to say is fine.

MS. TOWNE: It implies that all Council members collectively serve as presiding. And given the way Pete Dewell conducted the Whatcom hearing, only he asked questions, or our ability to directly interact with the parties was severely limited, let's say, which is contrary to the concept of all of us overseeing the conduct of the hearing.

CHAIR LUCE: We need to make a decision. I am okay with Ann's rewrite interpreting the laws of the Council as being the presiding officer, so substitute Ann's rewrite for 463-30-020.

MS. MAKAROW: I have just one question. Is it worthwhile to include here that there has to be a Council quorum?

MS. ESSKO: In adjudicative proceedings you've said that you're going to proceed by majority vote without a quorum. The problem you get into when you have a quorum is you have a quorum, so less than the full Council can make a decision, and then you can have a majority vote of that. You could end up with an adjudication being decided with less than the full Council wanting to make the decision. In other words, you could have the minority of the Council approving a project and the majority of the Council --

MS. TOWNE: Unless you say a majority of the Council.

MS. ESSKO: Yes. Whether you proceed by majority, super majority, arm wrestling.

CHAIR LUCE: No, not super majority.

MS. ESSKO: Quorums or not quorums, that's all at your discretion to do.

MS. TOWNE: On the Shorelines Hearings Board a member not participating in a hearing day reads the transcript and then is qualified to vote.

CHAIR LUCE: That's what we do. That's our practice.

MS. TOWNE: That is standard APA.

MS. MAKAROW: I guess I'm just making sure. I'm just clarifying in my own head what happens at a prehearing conference when not all of the Council members are in attendance.

MS. TOWNE: I don't think any of them has to be there.

MR. FIKSDAL: They're the presiding officer.

MS. TOWNE: Yes.

MS. ESSKO: The question of can somebody be absent, the answer is yes. And when that happens what Chris says has to occur. They have to read the transcript and familiarize themselves with that. That's a separate issue from the quorum issue which is how many people do you need in order to move forward?

CHAIR LUCE: Let's summarize this conversation. Where are we now?

MS. ESSKO: Where you are now is that for nonadjudication to proceed by quorum, and you do not have a rule that says if you proceed by majority rule or not. For adjudications back in 463-14-080 -- maybe that's 080. The one Irina passed out. This one, -- you say that you act by majority decision without saying whether you're going to have a quorum or not.

MS. TOWNE: See, that's the Council by majority decision. So that implies four votes no matter how many people were at the hearing or the action.

MR. FIKSDAL: The Council is made up of what we had in Olympic was 26 members.

MS. TOWNE: We may have seven or eight here.

CHAIR LUCE: And some of us may be back at Kittitas set aside. The Council members can't participate or they may recuse themselves of their own volition. The Council is still going to have to make a decision. I mean in Kittitas it could have gotten down to the point where one of us wasn't recused either voluntarily or by motion of a party. So the Council still has to make a decision. I mean that's the rule of necessity.

MS. ESSKO: Yes.

CHAIR LUCE: Under APA you can't pass the buck just because there's --

MS. ESSKO: Yes, I think statutorily you're in a less safe place by having a quorum applied to your adjudicative proceedings because it says the Council makes the decision. If somebody is recused, then the rule of necessity applies. You just go with whoever you have left, and if you have absences, they can participate if they read the transcript.

CHAIR LUCE: Do we have wording or is it all right? We kind of wrapped it around our ankle a little bit here.

MR. FIKSDAL: Was there a need to change something other than Ann's suggestion?

CHAIR LUCE: No.

MS. ESSKO: No. And I suggest that 030 be deleted. I don't think you need to define Council.

CHAIR LUCE: Right.

MS. ESSKO: In 060.

MR. FIKSDAL: 030 to be deleted.

MS. ESSKO: 060.

MR. FIKSDAL: 30-030 delete the whole thing.

MS. ESSKO: Yes.

MS. TOWNE: Well, okay.

MS. ESSKO: On 060(2), member agencies.

MS. TOWNE: It's not defined.

MR. FIKSDAL: Where are you now?

MS. ESSKO: 060.

MS. TOWNE: Line 34.

MS. ESSKO: Sub 2.

MS. TOWNE: If you go to 80.50.030(3), agency participation is listed, but there's no definition.

CHAIR LUCE: As specified in.

MS. TOWNE: Yes, that would --

CHAIR LUCE: So strike defined and insert as specified in.

MS. ESSKO: Also what do you want to do about the local governments, Sub 4 through 6? This just references Sub 3.

MR. FIKSDAL: I don't know where we are.

CHAIR LUCE: 060.

MS. TOWNE: Definitions - Persons and Parties.

MR. FIKSDAL: 30-060.

MS. ESSKO: The term "parties" should mean and be limited to "applicant." Okay. That's not a problem. "Each member agency as specified in 030(3)," which is just the people in this room. It does not include the cities, counties, and ports.

MS. TOWNE: You're right.

MS. ESSKO: Do you want to include the cities, counties, and ports? I suggest you do.

CHAIR LUCE: Can't you find some addition and such other? Port doesn't have to be there. All right. They're voluntary. So let's see. Each member agency as specified in RCW --

MS. TOWNE: Just delete Sub 3 after 80.50.030, and it will pick up the cities, the counties and the ports; won't it?

MS. ESSKO: Yes.

CHAIR LUCE: Delete Sub 3. Sub 3 as I have it is the Counsel for the Environment.

MR. FIKSDAL: No, the three after the --

MS. ESSKO: You have to say 3 through 6.

MS. TOWNE: Three through six.

CHAIR LUCE: Okay. As specified in three through six. Okay. Now next issue.

MS. ESSKO: 080. I was just getting tired when I was reading this, but I didn't know what the second sentence meant. The first one says, "Adjudicative proceedings shall commence upon issuance of a formal notice of hearing or prehearing conference." Okay. "The notice shall be served upon the parties at least 20 days in advance of the initial hearing date." What's the initial hearing date?

MS. TOWNE: First day of the hearing, I thought it meant. Not the date of the initial hearing but the initial day of the hearing.

MS. ESSKO: Is that not a problem for you because this is what triggers all the ex parte stuff. The triggering of the adjudicative proceeding happens way early in the process. It's the first thing when Irina sends out the first notice that we're going to have a prehearing conference.

MS. TOWNE: But the heading is adjudicative proceedings.

MS. ESSKO: Yes, adjudicative proceedings though.

MR. FIKSDAL: How about "the notice shall be served at least 20 days in advance of the commencement of the hearing"?

CHAIR LUCE: Great.

MS. ESSKO: But that's after the first prehearing conference.

MS. TOWNE: Yes.

MS. ESSKO: The reason you have to know the date the adjudicative proceeding starts, not the hearing, but when do we move from a preapplication mode? Like think about Wild Horse for a minute. We're not in an adjudicative mode yet. We're in some other mode. There's no

adjudicative proceeding. You don't have to worry about ex parte contacts. We don't have to worry about who you can talk to and who can't talk to you.

MR. FIKSDAL: You do.

MS. ESSKO: You do. But for the purposes of the APA, when does the hammer fall? When are we now within the APA cone of silence that is triggered by when the adjudicative proceeding starts?

MS. TOWNE: This section says it starts when you start thinking about scheduling a prehearing conference, not the adjudicative proceeding.

MS. ESSKO: Exactly.

MS. TOWNE: Not the hearing itself. And the prehearing conference may not have anything to do with adjudication for months.

MS. ESSKO: Let me look. That comes out of the APA. Let's see what the APA says.

MS. TOWNE: I missed that.

MS. MAKAROW: So actually here "initial hearing" covers any type of hearing in the adjudication.

MS. TOWNE: Yes.

MS. ESSKO: The APA says the adjudicative proceeding commences when the agency or presiding officer notifies a party that a prehearing conference, hearing, or other stage of adjudicative proceeding will be conducted.

MS. TOWNE: In our case the prehearing conference may or may not deal with the adjudicative stuff, but we're still --

MS. ESSKO: Right. It's when you're telling the parties come and be a party, come and be an intervenor, list your issues, come to a prehearing conference. You want it to start before then, and the APA seems to require it. Again, it's when Irina notifies a party that a prehearing conference or other stage will be conducted.

MS. TOWNE: So what's your recommendation?

MS. ESSKO: Of the first prehearing conference. Does that fit with how you folks do things?

MS. MAKAROW: What if you're in a situation where there are no prehearing conferences?

MS. ESSKO: When do you typically do it? Do you do it after the public information meeting?

MS. MAKAROW: We do it when we are ready to start the intervention process.

MR. FIKSDAL: Which is pretty soon. Well, it depends on the EIS. Our timing centers around the EIS.

MS. MAKAROW: That's changed recently, though.

MR. SWEENEY: Do you have to say when the notice goes out?

MS. TOWNE: Yes, because it starts it all.

MS. MAKAROW: The way I interpret the sentence is that, under normal circumstances, you cannot hold the first hearing or prehearing conference without giving people 20 days advance notice.

MS. ESSKO: Yes.

CHAIR LUCE: Have we resolved that?

MS. TOWNE: Working it through.

CHAIR LUCE: Okay.

MS. TOWNE: Everything else up to that time is us and the applicant. The potential site study, consultant selection, EIS initiation, and we don't have other parties. There aren't any parties to involve. So when do we get parties?

MR. FIKSDAL: We can define the initial hearing to be initial prehearing conference? It could be initial -- again, this is up to our interpretation.

CHAIR LUCE: I would think --

MS. ESSKO: Oh, yes. Because all the APA says is it starts when you notify a party that there's a prehearing conference, hearing, or other stage of adjudicative proceedings. You get to pick what you want to.

MS. TOWNE: Let's leave it flexible.

CHAIR LUCE: Then it's just fine as it is.

MR. FIKSDAL: Leave it.

CHAIR LUCE: Thank you. We are just going to leave it like it is.

MR. FIKSDAL: We'll define it.

MS. ESSKO: Okay.

MR. FIKSDAL: Before we go on, lunch is getting closer. Do you want us to try to find some lunch and bring it in? Do you want to leave? Do you want to leave at 12:30 and go grab something?

CHAIR LUCE: Let's leave at 12:30.

MS. TOWNE: 25 after.

MR. SWEENEY: I have something on 050.

CHAIR LUCE: Okay.

MR. SWEENEY: This seems to address ex parte. The last sentence says, "It shall be proper for the agency representative on the Council to communicate with employees of the represented agency, excepting those agency employees who have participated in the proceeding in any manner." That's a really awkward sentence, and I have a recommendation for fixing it. But I guess the first question I have that would be substantive which is it makes us sound like we can't communicate with any employees that are dealing with this case. But in our building we have an ex parte rule that you can't communicate about the case, right? Do we need to clarify that or is that relevant?

MR. FIKSDAL: 050?

MR. SWEENEY: We are not supposed to talk to anybody that had anything to do with an EFSEC case when in fact I do communicate with them. I'm wondering if I'm supposed to make ex parte disclosures about that. I don't talk about the case.

MS. TOWNE: So it should say it's okay to communicate with employees of representative agencies on matters other than the case before the Board or something.

MR. SWEENEY: My recommendation for sentence structure should be *what we shouldn't do*, not *anything that we can do*. It should in my recommendation be "shall not be proper for agency representatives on the Council to communicate with those agency employees who have participated in I assume what is proper."

CHAIR LUCE: Or do you even need it shall be proper? Maybe just agency representatives.

MR. SWEENEY: Yes. Whatever. I don't want the rule to tell me what is proper. It should tell me what is not.

CHAIR LUCE: Go ahead. What is your change?

MR. SWEENEY: "It shall not be proper."

MS. TOWNE: Well actually, "Members of the Council shall not."

MR. SWEENEY: Whatever. The key thing here is not, not what is. And then communicate with those agency employees who have participated in proceedings in any manner or who are otherwise disqualified. That only takes care of one part of the issue which is the sentence

structure. The other part is what about it's still broadly saying that I can't talk to anybody. So it should be communicated regarding any EFSEC proceeding.

MS. ESSKO: But did you take care of it by "members of the Council shall not communicate with agency employees who have participated in the proceedings in any manner?"

MR. SWEENEY: It's that "in any manner."

CHAIR LUCE: Well, just strike in any manner because, well, that's your problem.

MR. SWEENEY: Does any manner modify proceeding or communicate? What I'm trying --

MS. TOWNE: Participate.

MR. SWEENEY: Or participate. I'm concerned about communicating in any manner.

MS. ESSKO: Oh, you're right.

MR. SWEENEY: If somebody has participated in any manner, that's fine. I'm not supposed to talk to them about the case.

MR. FIKSDAL: Just in the proceeding.

CHAIR LUCE: In any manner. Strike in any manner. All right. That does it.

MS. TOWNE: So it should read, "Members of the Council shall not communicate with employees of the represented agency who have participated in a proceeding or who are otherwise disqualified by 05.455."

MR. SWEENEY: Whatever that is.

MR. FIKSDAL: Members of the Council shall not --

MS. TOWNE: Shall not communicate.

MR. FIKSDAL: Shall not communicate --

MS. TOWNE: Delete "be proper for the agency representative on the Council to."

MR. FIKSDAL: -- "with employees of the represented agency, excepting those agency."

MS. TOWNE: No, delete "excepting those agency employees." So employees of the represented agency who have participated in the proceeding. Delete "in any manner" and leave the rest of the sentence. I have it on mine, Allen.

MR. FIKSDAL: "Communicate with employees of the represented agency who have participated in the proceeding or who are otherwise disqualified." I got it.

MR. SWEENEY: Sorry about that.

MR. FRYHLING: So does that mean I can have discussions on this with my director?

MR. FIKSDAL: The director is the weirdest one of all.

MR. FRYHLING: Because they set policy.

MR. FIKSDAL: I wouldn't do it. You could talk to people in housing because they're not directly involved, but the Growth Management rule is a little different. That's so weird now.

MS. MAKAROW: I have a comment. This only applies to the state agencies. Should it be broadened also to apply to any local government representatives on the Council?

MS. ESSKO: Yes.

MR. FIKSDAL: So delete state?

MS. ESSKO: Agency and local governments.

MS. TOWNE: Then we need to change the title.

MR. FIKSDAL: And port district.

MS. TOWNE: How about status of members? Delete "of agencies" and "agency" on the title.

MR. FIKSDAL: "All agencies having members on the Council" and then delete "parties."

MS. TOWNE: That's different being a party than being a member.

MS. ESSKO: So all state agencies and local governments.

MR. FIKSDAL: What about port districts?

CHAIR LUCE: It's a local government.

MS. ESSKO: State agencies and local governments having members on the Council are deemed to be parties to any adjudicative proceeding. The agency or local government representative on the Council shall be deemed to be a member of the Council and not a member of the agency or local government. And then members of the Council shall not communicate with those agencies with --

CHAIR LUCE: It's just the rest of it, you got it; don't you?

MS. ESSKO: Same deal.

MS. TOWNE: The title should it read Status of Agency and Local Government Members?

MR. FIKSDAL: How about Status of Members?

MS. TOWNE: That's better. I prefer that.

MR. FIKSDAL: I think I have it.

CHAIR LUCE: You want to read it back as you think you have it?

MR. FIKSDAL: Let's see. So it should say, "Status of Members in Adjudicative Proceedings."

"All state agencies and local governments having members on the Council are deemed to be parties to any adjudicative proceeding before the Council. For purposes of any adjudicative proceeding, however, the agency and local government representative on the Council shall be deemed to be a member of the Council and not a member of the agency."

MS. ESSKO: "Or local government."

MS. TOWNE: Then at the end of that sentence you have to again add local government.

MR. FIKSDAL: Right. Then members of the Council shall not communicate, blah-blah-blah.

CHAIR LUCE: Okay. Let's move ahead.

MS. ESSKO: May I take 463-30-120 away and tinker with it? Not substantively but just in terms of organization. Service of process is really important, and I think this is a good start, but I would feel more comfortable if I could move things around a little bit. I'll get it back to you.

CHAIR LUCE: That's fine. When would you be getting it back to us?

MS. ESSKO: This week. I'll send it by email, if that's all right.

CHAIR LUCE: You can't make a decision by email.

MS. ESSKO: You can in rule making.

CHAIR LUCE: When you're doing that, would you put in something about typed pages like 8 1/2 by 11 paper, lined, numbered, and typed. This sounds kind of silly, but the games that get played in terms of we'll set the font at such. It's basic court rules.

MS. ESSKO: I'll see what the Court of Appeals says about that.

CHAIR LUCE: Lined paper would really be helpful during the adjudicative hearing, so you can actually refer to it instead of having to sit there and search it.

MS. TOWNE: I have one on 320 when we get there.

CHAIR LUCE: 320?

MS. TOWNE: It's on the last page.

CHAIR LUCE: I have one on 463-30-200(5), Line 36 through 38.

MS. TOWNE: Yes.

CHAIR LUCE: No subpoena shall be issued to a member of Council staff. Period, new sentence. For these purposes, the Council's independent consultant is deemed a member of EFSEC's staff.

MR. FIKSDAL: Read it again. For these purposes, the Council's independent consultant is deemed a member of EFSEC's staff.

MS. TOWNE: Of the Council's staff.

CHAIR LUCE: Right. What's the next one somebody had?

MS. MAKAROW: I have a question. What about state agency contractors who work on our permits?

CHAIR LUCE: That would include that. EFSEC's independent consultant and state agencies.

MR. FIKSDAL: Now, you're going to get into defining everything. Well, sometimes it's local agencies and sometimes it's state agencies.

CHAIR LUCE: Well, I want the independent consultant. You need to tell me.

MR. FIKSDAL: You can call them independent consultants too.

CHAIR LUCE: Fine. That's easy. So we will sign contracts with independent consultants.

MS. ESSKO: So what do you define as contractors?

CHAIR LUCE: We're just going to leave independent consultant. When we have contracts or work with the state agencies, it shall be independent consultants.

MS. ESSKO: Okay.

CHAIR LUCE: Somebody else had something on this?

MS. TOWNE: 320. I am confused between initial and final order. In 320 the title is Entry of Initial and Final Orders, which presumes that we will do both. And then it says every decision and order whether initial or final. Are they the same? Do we always do both?

MS. ESSKO: We actually do neither probably.

MS. TOWNE: We just issue an order.

MS. ESSKO: And you can tell whoever drafted the original version of this tumbled to that issue. Look at 330. What you do is 390. An agency can set up an initial order regime if it wants to. For example, if EFSEC were to have Irina do an initial order, there could then be an appeal to the whole Council. The Council issues final orders. Hers would be an initial order and they could move for appeal to the whole Council.

MS. TOWNE: The Shorelines Hearings Board does often have parties write, I don't know if they call it initial, but it's a proposed order, and then the board tinkers and issues its order.

MS. ESSKO: Exactly. Final orders under the APA, the contents of the final order under the APA has to be restricted to what it heard in the adjudicative hearing and it is subject to judicial appeal neither of which applies to your recommendation to the Governor. So you issue neither.

MS. TOWNE: I don't think we should have this section. It really bothers me.

CHAIR LUCE: Strike 30-320 is that what you're saying?

MR. FIKSDAL: This probably started off back when you had the hearing examiner and the hearing examiner would write an initial order for the Council to consider. Fundamentally you've changed the way you're working by having the Council as its presiding officer, and now we don't have an initial order and all that.

MS. TOWNE: But remember we're not doing a final order. We're doing a recommendation. It's a different critter, and we still may want to go through these steps. But do we have numbered findings of facts, numbered conclusions of law, rights to reconsideration?

MS. ESSKO: You do issue orders. I mean you issue orders from prehearing conferences. You will probably arm wrestle if there's a solution on the issue of if you issue an order after an adjudicative proceeding. It's just not a final order under the APA.

CHAIR LUCE: Why don't we just say entry of initial and --

MR. FIKSDAL: You have to decide if you're not doing either.

CHAIR LUCE: Well, we'll define them as we go along.

MS. TOWNE: How about preparation of recommendations to the Governor and then list what steps you take?

CHAIR LUCE: That's great.

MR. FIKSDAL: So preparation of recommendations. Back to 320.

CHAIR LUCE: That's where we are.

MR. FIKSDAL: So you're going to change this to --

CHAIR LUCE: The title.

MR. FIKSDAL: -- preparation --

CHAIR LUCE: Of recommendation to the Governor.

MS. TOWNE: Now, this begs the question of prehearing orders.

MR. FIKSDAL: Then you get into other orders and other orders of the Council.

MS. TOWNE: But prehearings orders, I read Adam's No. 7 and it didn't have numbered conclusions of law. It just is largely procedural, and so it doesn't follow this format anyway.

MR. FIKSDAL: So do we have prehearing orders?

MS. ESSKO: You do in 270(3).

MS. TOWNE: Yes, that probably works fine. So I think we can just confine this to our recommendation to the Governor.

MR. FIKSDAL: Is there ever a case in an adjudicative proceeding that you might issue an order other than a prehearing conference?

MS. ESSKO: Yes, at most hearings. Didn't we just issue one in BP? Discovery orders we might issue that might not come out of a prehearing conference.

MR. FIKSDAL: So we have it for the prehearing conference. Do we want anything about orders?

MS. MAKAROW: We have orders issued on motions.

MS. TOWNE: I'd stick them over in that 200 section.

MS. ESSKO: It's not critical if you don't. If you've got ways you want to transact business, it's better to have that in your rule than not.

MR. FIKSDAL: Well, back to 320. We're going to change the title.

CHAIR LUCE: Right. To Preparation of Recommendation to the Governor.

MR. FIKSDAL: And then so the rest stays.

MS. TOWNE: You then say every recommendation shall be captioned da-da-da. And then six you have to change because it's initial or final orders. Contain a recommendation.

CHAIR LUCE: That's good. Contain a recommendation disposing of all contested issues.

MS. TOWNE: I don't know if 7 is applicable, since it is a recommendation. We got into this thrash with Lathrop on Kittitas.

CHAIR LUCE: I have a fix here; comma, if any.

MS. ESSKO: I'd just take it out.

MS. TOWNE: I don't think it's applicable.

CHAIR LUCE: That's fine. Just take it out.

MR. FIKSDAL: Delete 7?

CHAIR LUCE: Delete 7 or delete 8? Contain a statement describing --

MS. ESSKO: Both.

MS. TOWNE: Both. Eight kind of restates.

MS. ESSKO: Hold on. Since I've not been through one of these, do you issue an order and then wait so many days? Do they have a right to come to you and ask you to change your recommendation?

MS. TOWNE: There's a motion for reconsideration.

MS. ESSKO: Then you would want to put that in here.

MS. TOWNE: Which one?

MS. ESSKO: Seven. Seven would go in.

CHAIR LUCE: Seven you want. I mean that 7 is Sumas, isn't it, in a sense? Didn't they come back to us for a motion for reconsideration? But I would delete 8.

MS. ESSKO: Delete 8. In four delete, just say contain appropriate numbered findings of fact, period, because of that requirement of 34.05.461.

CHAIR LUCE: Okay. You've got that, Allen?

MR. FIKSDAL: Yes.

MS. TOWNE: Then we have to go at 330 because it doesn't make sense.

MS. ESSKO: You don't have an initial order.

MS. TOWNE: Right.

MS. ESSKO: I would just delete that.

MR. FIKSDAL: Delete that?

MS. ESSKO: All of 330 because you don't have initial orders. You issue a recommendation. You don't delegate to Dick and Tim to issue an initial order that they can appeal to the whole Council.

MS. TOWNE: Well, actually 7 above in 320, right to reconsideration. You could argue that 330 should set forth that right to reconsideration.

MS. ESSKO: Yes. You could change 330 into describing what Sub 7 means, yes.

MS. TOWNE: So do we want to do that?

MR. IFIE: Isn't that what 335 is?

MS. TOWNE: Here we have a final order again.

CHAIR LUCE: Yes. Just make 335 final recommendation. Now I don't know why you want to delete 330. Couldn't you just delete "of initial order?" Petition for Review and Replies and then go through there. Again, one says order, so change the orders to recommendation.

MS. TOWNE: 335 you have it under 34.05.470, and I'm not sure that process is exactly what we want.

MR. FIKSDAL: I would just have it a Petition for Reconsideration of the Final Recommendation shall be filed.

CHAIR LUCE: With the Council manager.

MR. FIKSDAL: Then you could actually say within 20 days and take number two from 330 up there basically or just take 2, 3, 4, and put them under 335.

CHAIR LUCE: I would propose we do that, and let Allen do it.

MS. TOWNE: Okay.

CHAIR LUCE: Changing the word order to recommendation and moving 2, 3, and 4 and incorporating those into 335.

MS. TOWNE: And getting rid of the WAC citation.

MR. FIKSDAL: Yes.

MS. ESSKO: One other thing. 280 I suggest that you just delete it.

MR. FIKSDAL: 280.

CHAIR LUCE: I'll put it on the table. It will either go or not go.

MS. ESSKO: It just clouds the issue that we talked about.

CHAIR LUCE: Okay. Moving right along, 463-34, Petitions for Rule Making and Declaratory Orders.

MS. TOWNE: 030(2).

MS. ESSKO: If you look at the APA, OFM has rules on this already that you have to follow. Looking at it quickly, I don't think you've got the freedom to make your own rules.

CHAIR LUCE: Why don't we delegate this to you and Allen to work it out? I mean what is incorporated into a petition quite frankly seems to be more a matter of law than a matter of policy. I would suggest that Allen and Ann get together and work out whatever has got to be there.

MR. FIKSDAL: We'll figure something out and get it back to you.

MS. TOWNE: In case you don't substantially alter this, if you look at 030(2)(b) new rule. Okay. Never mind. Never mind.

CHAIR LUCE: Okay. Moving right along, Terminating a Site. A little of bit of substance.

MS. ESSKO: I only had one high level comment on 070 and 080. It sets out when you can proceed by resolution and when it has to go to the Governor, and those ought to be black and white, on and off, yes and no answers, but the two don't match. So you end up with things that fall between the cracks. So I would suggest that somebody check to make sure that they fall into one catch all or the other.

MS. TOWNE: Give me a specific.

MS. ESSKO: Let me get my file up here. 070 says you can proceed by resolution when there is no significant detrimental effect and no effect upon the environment or potential environmental impact.

MS. TOWNE: But we've left out significant there. That was my question.

MS. ESSKO: So that's when you can do it by resolution. Going to the Governor, you would think by going to the Governor, the rule would then say if 070 doesn't apply, then it goes to the Governor. Instead it sets out a different standard which they have sort of, which staff has addressed but so that at least both of them now say --

MR. FIKSDAL: We have a change on here or we think we did.

MR. MILLS: We rewrote 70, Approval by Council action. An amendment request which does not substantially alter the substance of any provision in the SCA for which is determined not to have a significant detrimental effect upon the environment shall be effective upon approval by the Council. Such approval may be in the form a Council resolution. So we tried to distinguish between the Council taking an action versus the form that it comes out in. So we felt that there was two ways that you could alter the SCA. You could do it by Council action or you could make a full recommendation to the Governor.

CHAIR LUCE: That works for me.

MR. IFIE: Is that something that we have?

MR. MILLS: Apparently not. We'll get copies and maybe if we have to, we can come back to it.

MR. FIKSDAL: We will make the copies right now.

CHAIR LUCE: We got an orange sheet in here somewhere.

MR. FIKSDAL: Those just happened to be the color that was in the copier. Some came out orange and some didn't.

CHAIR LUCE: 463-39 Permit Regulations for Air Pollution Sources. Anybody have any recommendation, any changes?

MR. FIKSDAL: Let's go back to 36.

CHAIR LUCE: Okay.

MR. FIKSDAL: When you get to the third page it says new section.

MS. TOWNE: Something is wrong with the title.

MR. FIKSDAL: That whole thing was going to be deleted and moved to a new chapter.

MR. MILLS: It's moved into a new chapter.

MR. FIKSDAL: So delete that whole thing.

CHAIR LUCE: You moved that?

MR. FIKSDAL: Have you changed it, Mike?

MR. MILLS: I believe it's changed from what's here, yes.

MS. TOWNE: Well, the title doesn't match the text, so you need to change that.

CHAIR LUCE: We're going to delete it anyway.

MS. TOWNE: Well, it's moved. I want to make sure it doesn't carry a bad title.

MR. FIKSDAL: Irina's here with the copies. Back to 70 that Irina is passing out right now.

MS. ESSKO: Fabulous.

MS. TOWNE: Problem solved.

CHAIR LUCE: Problem solved. I like those words. Done. 463-39 WAC.

MS. TOWNE: 010, line 2, or pardon me. It's on Line 22 or 21.

MR. FIKSDAL: Irina, does this match what you put in for the emergency changes or emergency rule making?

MS. MAKAROW: Yes.

MS. TOWNE: On Line 21, it says, "This chapter is designed to operate within the statutory framework for the distribution of responsibilities between state, regional, and local units of government in dealing with problems of air pollution." Since we are operating under the CFR, should it say federal -- should it read "distribution of responsibility among the federal, state, regional, and local units of government in dealing with problems of air pollution?"

CHAIR LUCE: I would strike *with problems*, just in dealing with air pollution. But that's fine to stick in fed. Fed is on there after all. Any problems with that?

MR. FIKSDAL: It's up to Irina. This had already been submitted to the code reviser.

MS. TOWNE: I thought we had an objection.

MR. FIKSDAL: Yes, we do.

MS. TOWNE: So we can't go on to the emergency.

MR. FIKSDAL: We were going to try talking to the person to see if they would.

MS. TOWNE: Why don't we just forget about it and deal with it with the whole thing?

CHAIR LUCE: Because it's supposed to be done immediately.

MR. FIKSDAL: Well, the faster the better for this, so we can implement things.

MS. MAKAROW: We'll take note of these.

MS. TOWNE: I don't have any great argument.

MS. MAKAROW: Are there any others?

CHAIR LUCE: It's been submitted to the code reviser.

MS. TOWNE: Yes, on Page 9, bottom of the page, Sub 4, the third line. It says, "The Council, after notice to such person and an opportunity to comply..." It looks like there was a word missing.

MR. IFIE: What line are you on?

MS. TOWNE: Again, it's all right. Never mind. Let it go.

CHAIR LUCE: All right.

MR. IFIE: I have a question about 170, Conflict of Interest.

MS. TOWNE: That's federal. That's right out of the CFR, and it makes no sense.

MR. FIKSDAL: So that's why they copied it.

MS. TOWNE: It's verbatim. I went and looked it up, and I imagine it's federal court cases. Do you know, Chuck?

MR. CARELLI: I don't know.

MS. MAKAROW: It's both in the Clean Air Act and The Clean Water act. It's federal law.

CHAIR LUCE: Okay. Moving right along.

MR. IFIE: I need help. Does anybody have any need for this? We are putting something here that we are not going to comply with. We are not complying with it.

CHAIR LUCE: We can comply with it. We're putting something in here we're not entirely sure what it means, but it has to be here.

MR. FIKSDAL: If we didn't, we wouldn't have our rules passed by the fact we wouldn't be able to implement our permits.

MS. ESSKO: What would trigger folks to come back and look at this book? Is there a situation in which Councilmember Sally could have had a significant portion of income from --

MR. FIKSDAL: It's an issue.

CHAIR LUCE: It's an issue, but it's an issue that I don't think we are going to be able to resolve today, tomorrow, until it comes out. Applications for Site Certification.

MS. TOWNE: First, Dangerous Wastes, Sub 440. No changes.

MR. FIKSDAL: There are no changes.

MS. TOWNE: It looks clean.

MR. FIKSDAL: This is one of the things where we don't really have authority over some of this stuff because of RCRA and CERCLA we didn't get delegated.

MS. ESSKO: Thank God.

CHAIR LUCE: Now are we at 42?

MR. FIKSDAL: Do we even want to start? We have fifteen minutes.

MS. TOWNE: We have 42, Applications for Site Certification.

CHAIR LUCE: I have a suggestion, and I mean as painful as this is in terms of line by line, I think that's the way to do it. That way we are drawing closure to these issues. So my suggestion would be we are not going to be through in 15 minutes, so maybe we should reconvene sometime later this week. We just need to punch through this.

MS. TOWNE: I'm leaving town Wednesday.

MR. SWEENEY: Can we just meet after the meeting today?

MR. FRYHLING: That's fine. We're all here.

CHAIR LUCE: Okay. Fine.

MR. IFIE: Or in two weeks having it at the same before the next meeting like we are doing it now.

CHAIR LUCE: When will you be back?

MS. TOWNE: The 27th, Saturday night.

MR. FIKSDAL: Let's do it after this meeting as much as we can.

MR. SWEENEY: Let's press on. We don't have that big of a meeting today.

MS. TOWNE: And we can keep going on some of the small stuff just to clear the clutter before lunch.

MR. FIKSDAL: We will skip 42.

MR. SWEENEY: We will skip 42.

MR. FIKSDAL: That's probably one of the biggest ones. That and 60 is the biggest.

CHAIR LUCE: Expedited processing.

MS. TOWNE: Wait a minute.

MR. FIKSDAL: This would be 43.  
MS. TOWNE: 43, right.  
CHAIR LUCE: For is f-o-r-e on Line 25. That's a no brainer.  
MR. FIKSDAL: Just spell checking.  
CHAIR LUCE: I didn't have anything on expedited processing.  
MS. TOWNE: I had a bunch, and they all went to compliance with city, county, and regional land use plans or zoning ordinances. It should be "and", and I so noted.  
MR. FIKSDAL: Okay.  
MS. TOWNE: Nothing on independent consultant.  
MS. ESSKO: You might get rid of that 020 because there's a whole separate statute that tells you what kind and how you do your contracts if it's a personal services contract.  
MS. TOWNE: What are you looking at?  
CHAIR LUCE: Where are we?  
MS. ESSKO: We are at 50-020.  
MS. TOWNE: Oh, okay.  
MS. ESSKO: I don't even know if it still has guidelines for using outside consultants, but they have the personal services contracts section which is different.  
MS. TOWNE: Oh, okay. This is 1976.  
MR. FIKSDAL: Yes.  
MS. ESSKO: Yes. In other words, there's a whole different regime that tells you how to do independent contracting through the independent consultants, and I don't think you need it in your rules. You just trip yourself up because this is old stuff that doesn't really apply.  
MR. FIKSDAL: The whole thing?  
CHAIR LUCE: Just 020. That's all.  
MR. FIKSDAL: So you want to delete that?  
MS. ESSKO: Yes.  
CHAIR LUCE: That's fine. We have to follow regs anyway.  
MS. ESSKO: Yes.  
CHAIR LUCE: I didn't have anything more on that.  
MR. FIKSDAL: I've got to make a note.  
MR. MILLS: Ann, on this is there a difference between independent consultant and contractor? Are we defining independent consultant?  
MS. ESSKO: No. Your statute says you have to hire independent consultants, and then you look at the other statutes to see whether or not it's going to be a personal services contract, a client services contract, or purchased services contract.  
MR. MILLS: Or an interagency agreement.  
MS. ESSKO: Or an interagency agreement, yes. And it will most likely be your independent consultant. If you hire someone outside of state government, it will most undoubtedly be a personal services contract. If it's an agency, it will be an interagency agreement.  
CHAIR LUCE: 463-52, Issuance of a Site Certification Agreement.  
MS. TOWNE: 020, middle of the paragraph, "The Council shall include conditions in the draft certification agreement to implement the provisions of this chapter." And this chapter doesn't have provisions.  
CHAIR LUCE: Just strike implement the provisions of this chapter including but limited to blah-blah.

MS. ESSKO: There's an apostrophe on 010 second line, recommendation's. It shouldn't have an apostrophe.

MS. TOWNE: Yes, I picked up all that stuff. So how do we reword that?

CHAIR LUCE: Say the Council shall include the conditions in the draft certification agreement.

MS. TOWNE: We don't do a draft certification agreement.

MR. FIKSDAL: Yes, we do.

MS. TOWNE: Yes, we do. This isn't the recommendation. This is what we send with it.

MR. FIKSDAL: The Draft SCA goes with the recommendation.

CHAIR LUCE: Just strike to implement the provisions of this chapter, including but not limited to.

MR. MILLS: Because the law says approve the application and execute the draft certification agreement. So that's where I got that language out of 80.50.100.

CHAIR LUCE: Right.

MS. TOWNE: Then the first part of the sentence should read "The Council shall include in ...", delete the word condition because then you pick up conditions.

CHAIR LUCE: That's fine. We are dancing here. It shall include in the draft certification agreement strike "to implement the provision of this chapter including but not limited to the conditions" blah-blah-blah. Anything else on that one? All right. 463-53, Term of Site Certification Agreement.

MR. MILLS: I think this is where the other section went.

MR. FIKSDAL: That we deleted. That was in 36-110 where it says in new section.

CHAIR LUCE: Okay.

MS. TOWNE: Which section was that?

MR. FIKSDAL: That was back in Chapter 36-110 entitled new section. We deleted it.

MS. TOWNE: Yes.

MR. FIKSDAL: Then, Mike, go ahead.

MR. MILLS: Place it from where it came from?

MR. FIKSDAL: Yes.

MR. MILLS: They retitled that, Term of Site Certification Agreement, and the term of the agreements have been specified in construction to begin within ten years of reporting -- on the back page here -- within the five-year period, and then first five years, and within the period of the five to ten years. This language basically came out of the site certification agreement conditions that we placed upon new certificate holders. I think it is not inconsistent with what the section was proposed before, but I thought we should try to base this on what we're actually doing. The part we've added is on 030 attempting to define when construction activity would actually begin and noted the requirement for submittal of plans and specifications, which is also taken out of the site certification at 040. It says at least 90 days prior to beginning of construction. Then added the reporting requirements in the first five years and then the period of time five through ten.

CHAIR LUCE: I am fine with this. This looks goods to me.

MR. SWEENEY: This is duplicating 463-36-110.

MR. FIKSDAL: That's what we got rid of, 36-110. We deleted that section and moved that into this section.

MR. SWEENEY: Does it deal with the issue of delay once they have initiated?

MR. MILLS: That's covered under site restoration.

MR. SWEENEY: They initiated but haven't completed.

MR. MILLS: Right.

MS. ESSKO: This is an existing section of the rules, 463-53.

MR. FIKSDAL: No, this is a whole chapter.

MR. MILLS: This will be a whole new chapter.

MS. ESSKO: Okay. Fine.

MR. MILLS: The section we said we were moving here, that was a proposed rule.

CHAIR LUCE: 463-54, Certification Compliance Monitoring, Determination and Enforcement.

MS. ESSKO: I only had one question in the Purpose. It says "monitoring the effects arising from the construction and operation." You also want to just monitor compliance with the SCA. You don't want to have to wait for there to be some effects. In other words, can you nail them when they violate the SCA?

MS. TOWNE: You could delete "effects arising from the".

MR. MILLS: Just monitoring construction and operation.

MR. FIKSDAL: Yes.

CHAIR LUCE: Good.

MR. MILLS: Quick question. The only other change which we should add would be the word monitoring.

CHAIR LUCE: I had one question on 060(1), Department of Ecology or authorized representative is delegated. That's one. And then down in (2), the Department of Health is responsible. Is there a difference between delegated and responsible?

MS. TOWNE: Good question.

MS. ESSKO: I'm not sure, what do you intend by delegated? Because this means they don't even have to come to you. They could just go out and do it, assuming you have the authority to delegate.

MS. MAKAROW: I know part of it comes out of the Clean Air Act, the Washington State Clean Air Act where this language is actually in there, and if you recollect we were looking at this many, many months ago.

MR. MILLS: That's the language that's in the current rule.

MR. SWEENEY: Why don't we make them both responsible and you do delegate it?

CHAIR LUCE: That's separate though. You're delegating something that you're not even sure what you're delegating. But maybe I am wrong.

MR. MILLS: I think we would be in violation if we change that.

MS. ESSKO: Didn't we deal with this with the Southwest Clean Air Agency?

MS. TOWNE: Because you have delegation from the state to an air agency at the regional level. That's the delegation. It's a second level delegation. The first is the feds to the state, and the second is from the state to the regional, if any.

MR. FIKSDAL: I wouldn't mind changing it. The only problem is it's in the act itself.

CHAIR LUCE: If the act itself controls --

MR. FIKSDAL: If you say something different than what the act is saying.

MS. MAKAROW: In 70.94 there's a clear statement of delegation to Ecology.

MS. TOWNE: Right.

MS. MAKAROW: Not to any other local government.

MS. ESSKO: But what does that mean? If EFSEC has an SCA, do you think that the Clean Air Act delegates enforcement of that SCA to Ecology? EFSEC's now out of the picture, and it's Ecology that does it. And it can just flip the bird to EFSEC and do whatever it wants because it's now been delegated to.

MS. TOWNE: Undelegate it.

MR. FIKSDAL: What this section is trying to say is the monitoring activities have been delegated but not enforcement.

MS. TOWNE: The intent of this is to sort out what health hazards are radioactive and what Ecology does, which is nonradioactive as far as I could see.

MR. MILLS: It's clear the right word is the Department of Health. I guess the only hang up or question I would have is if we did get with Ecology or with the federal delegation.

MR. FIKSDAL: If we change it to "responsible" and the act controls delegation, then we are bound by that.

MS. ESSKO: So is Ecology staff sort of out there actually putting out little sensors, and are they sensing the air pollution?

MR. MILLS: Under their contract with us, yes, they have the ability to do whatever we contract for. They're not out doing it on their own.

MS. ESSKO: So that's the guts of the issue. Does the act say the legislature is delegating to Ecology the responsibility to do monitoring or does EFSEC have to hire them to do that?

MS. TOWNE: The Council shall contract with Ecology to take care of nonradioactive and shall contract with Health to care for the radioactive stuff. Then we get out of delegation or responsibility. It's us. But we hire somebody who knows how.

MS. ESSKO: That's clearer, and then as I think Allen or somebody said, if it turns out that the statute really means that EFSEC doesn't have the authority to do the contract, then somebody can raise that issue. At least EFSEC has staked out its ground that those monitoring activities have to be under EFSEC contracts.

CHAIR LUCE: Have we made a decision?

MR. FIKSDAL: Not yet.

MS. ESSKO: We're inching toward one.

CHAIR LUCE: No lunch without finishing this issue.

MS. ESSKO: How about "the Council may contract with the Department of Ecology or authorized representative to perform monitoring activities blah-blah-blah?"

CHAIR LUCE: Where are we?

MS. ESSKO: 060(1).

MR. FIKSDAL: The Council may contract with the Department of Ecology or its authorized representative for monitoring.

MS. ESSKO: Yes.

MR. FIKSDAL: For monitoring activities pertaining to air and water except as provided in Subsection 2.

MS. ESSKO: Which would then say "the Council may contract with the Department of Health for monitoring activities pertaining to radionuclide emission blah-blah-blah."

CHAIR LUCE: I was out of the room. That's fine with me.

MS. ESSKO: Mike, are you comfortable with that, and Irina?

MS. MAKAROW: Yes.

MR. MILLS: I think once I look at it.

MS. ESSKO: Allen?

MR. MILLS: Ann, can you read that second one for me.

MS. ESSKO: Sure. The Council may contract with the Department of Health for monitoring activities.

MR. MILLS: Okay.

MR. FIKSDAL: That's all right.

CHAIR LUCE: Okay.

MS. ESSKO: Is that okay with everybody?

MR. IFIE: Except for the fact doesn't the law kind of say we have to contract with Department of Ecology for --

MR. FIKSDAL: We have to contract with state agencies when doing compliance.

MR. IFIE: When it comes to Ecology, it seems like there was a law. We don't have a choice in the matter.

MS. TOWNE: So it would be shall rather than may.

MR. FIKSDAL: Let's leave may.

CHAIR LUCE: Let's leave may. But it can read shall and scratch may.

MR. FIKSDAL: We can have shall in both of them. I mean if you're going to do it, go for it.

MR. IFIE: One is a mandate.

CHAIR LUCE: If we leave it as may, it gives us a little more discretion.

MR. IFIE: If the laws says otherwise.

CHAIR LUCE: Then the law says otherwise.

MR. FIKSDAL: Let's leave it may.

MS. ESSKO: "May" leaves you the discretion to contract with anybody. If you decide to contract with somebody, Tony's right. It has to be Ecology or Health.

CHAIR LUCE: May it is. It is now 12:30. I am going to recess this special meeting of the Siting Council to be continued after the conduct of our regular business meeting commencing at 1:30. Is that okay? All right. So we are in recess until such time.

(Recess taken from 12:30 to 2:45 p.m.)

CHAIR LUCE: Let's be back on the record. The Council meeting, the Special Council meeting for discussion of the rules has been rejoined. 463-42 WAC, I talked a little bit to Council members, and there was some suggestions in terms of reorganizing parts of this; although, I haven't heard anything. First of all, Allen, why don't you explain what you did in terms of moving the provision.

MS. TOWNE: Are we not going to deal with 55 and 58? They are two minutes.

CHAIR LUCE: Let's deal with them. 55 and 58. What is 55?

MS. TOWNE: 55 is site restoration and preservation. There doesn't seem to be anything.

CHAIR LUCE: Okay. I didn't have anything on that.

MR. MILLS: Site restoration 010, 020, and 030 are new. 040, 050, 060, 070, and 080 are from existing rules. Basically those five are the plan requirements for the type of project status that requires a plan.

CHAIR LUCE: I had one suggestion on 55. Let's see if it still make sense. It did when I read it. 070 Site Restoration - Termination Projects, Page 3. In the absence of a Council determination as to the -- maybe it's the same thing -- as to level of site restoration, or as I was going to say instead of that, as to the contrary site restoration reasonable approximation. But maybe they both say the same thing.

MR. FIKSDAL: Let's just keep it.

CHAIR LUCE: Then moving ahead.

MS. TOWNE: 58, which is fees.

CHAIR LUCE: Fees. Any comments on 58?

MS. TOWNE: Yes. 040 doesn't make sense to me. Maybe it was too late last night.

MR. FIKSDAL: Why doesn't it make sense to you? It doesn't make sense at all.

MS. TOWNE: I couldn't even think of what it ought to say.

MS. ESSKO: Should it be "under?"

MR. FIKSDAL: I think it is "under."

MS. ESSKO: Yes, it's "under."

CHAIR LUCE: Okay. Anything else?

MS. TOWNE: No.

MR. FIKSDAL: Someone couldn't read my handwriting.

CHAIR LUCE: So, Allen, can you explain on -- and I want to save time here. In fact, maybe we should just jump ahead right now. Let's jump ahead right now and go to the new chapter.

MR. FIKSDAL: To the standards?

CHAIR LUCE: The first one is 463-60-010. I have a recommendation here. Actually I had a question. This chapter sets forth performance standards for mitigation requirements specific to seismicity, noise, protection of fish and wildlife, wetland, and CO2. It doesn't do CO2 anymore. But did we encapture all the other standards that we are adopting in this list? We have site restoration.

MR. FIKSDAL: Air quality. No, I don't think so.

CHAIR LUCE: I just would go through and make sure we've got the rest of them in there. One of them is site restoration. One of them is --

MR. FIKSDAL: If you look at the list above, we have noise, fish and wildlife, water resources, environment, aesthetic and other benefits, water quality, air quality. Those are it?

CHAIR LUCE: All I'm saying is site restoration is a standard. You've got to restore the site to X.

MS. TOWNE: But that's not in a site.

MR. FRYHLING: That's in your site agreement. That has nothing to do with the application and meeting of standards.

MS. TOWNE: Let's start with what is this chapter? Read the words there. WAC Siting Performance Standards and Mitigation. WAC Siting Standards for Energy Facilities, Application for Site Certification. Now what is it?

MR. FIKSDAL: Let's get rid of a lot of that.

MS. TOWNE: Tell me what we're talking about.

CHAIR LUCE: Performance standards.

MR. SWEENEY: I think performance standards.

MS. TOWNE: It's not just siting. It's operations clearly. Or is it performance and mitigation standards?

CHAIR LUCE: That would be acceptable.

MR. FIKSDAL: Although there isn't a whole lot of mitigation.

MS. TOWNE: There is in fish and wildlife and wetlands.

MR. FIKSDAL: But we took those and put them in part of the application, so it's not.

MS. TOWNE: But you don't impose standards in an application. This is the benchmark, setting the benchmarks against which the Council will measure compliance with 80.50.010's intent, I think. Ann, help me.

MS. ESSKO: Yes. If you want to make this enforceable, you have to tell the world "these are standards," and we're going to measure you against these standards. It's a little more problematic if you put them in an application section and you said here's the information we want to know,

then you've got to put them in your SCA. And it's a question of whether you're going to do it or not. If you want to bind the world, you say "this is a standard. We're going to make you do this."

MS. TOWNE: So I would call it standards for performance or for construction, operation, and mitigation or something along those lines. Let's be clear about what we're trying to do because I thought we were saying, "Here's the rules. Here's the hurdles we're setting up."

CHAIR LUCE: Pass go, collect license.

MS. TOWNE: Yes.

MR. IFIE: It seems like it's a construction and operation standard because that's all it covers, construction and operation.

CHAIR LUCE: And mitigation is implicit in the construction. You've got to mitigate to get this.

MS. TOWNE: Yes.

CHAIR LUCE: So Construction WAC Citing.

MS. TOWNE: Skip WAC.

CHAIR LUCE: Siting, Construction and Operation Standards.

MR. FIKSDAL: It shouldn't even be siting.

CHAIR LUCE: All right. Construction and Operation Standards. We defined it to be for new energy facilities. That's what it is.

MR. FIKSDAL: Yes.

CHAIR LUCE: Construction and Operation Standards for Energy Facilities.

MR. FIKSDAL: Yes.

CHAIR LUCE: Okay.

MR. FIKSDAL: Go ahead.

MS. TOWNE: Then if you start in on the list, the index, we have 001 Purpose. Like we have it twice. But then down below it's 010 Purpose.

MR. FIKSDAL: No. The numbering, forget that.

CHAIR LUCE: We will straighten out the numbering. 463-62-001 Purpose, Page 2, Sub 3, there's some awkwardness here if we're really trying to set standards. What I think we agreed to is compliance with the standards satisfies in their respective subject areas, which indicates that not all subject areas may be covered; although, we hope they are. Requirement for issuance of a site certificate above provided, however, that the Council may require additional mitigation in the event that, and then I would strike in the course of the Council proceedings, including I would have it read in the event that compliance with SEPA demonstrates that the project poses a probable significant adverse impact not mitigated by provisions of this chapter. And if you leave the language as it's written, then what you basically are opening up is you have a standard but anything else that comes in, in the course of Council proceedings, you will listen to that too. So it's inconsistent with the notion of a clear standard. Now, on the other hand, if it comes in through SEPA and significant adverse impact is shown, totally different situation. Any problem with that, folks?

MS. TOWNE: No.

MR. IFIE: I agree.

MS. TOWNE: But let's go back and look at the purpose on Page 1, Line 25. Should that be merged with the purpose on Page 2, at Line 8?

MR. FIKSDAL: Yes. This is all a continuation.

MS. MAKAROW: I think the intent is that, yes, they're together.

MR. FIKSDAL: That new WAC on Page 2.

MS. TOWNE: But you will see that they're two different numbers, so I thought they were --

MR. FIKSDAL: No.

MS. TOWNE: -- imported from somewhere else. They now need to be meshed together.

MR. FIKSDAL: That's right. They are. We tried to do it with the numbering, and we forgot the other little bit. The 463-60-010 Purpose No. 1 reads -- "that's accepted without the carbon dioxide." Number two 2 on Page 2, Line 9, and then (3) starts on Page 2, Line 16, and (4) starts on Line 24.

CHAIR LUCE: Right.

MR. FIKSDAL: That's one, two, three, four of that first purpose.

MS. TOWNE: I'm having trouble with (4) on Line 24. Read that sentence.

CHAIR LUCE: Don't you just want to say subjects not covered? We've already said impacts not covered because that will come up in the course of SEPA.

MS. TOWNE: Standing alone after the modified three that you just described, this is another --

CHAIR LUCE: Okay. It's open ended.

MS. TOWNE: Whatever. And we've already covered it, so let's get rid of it.

CHAIR LUCE: Delete four. Seismicity. I would just make it read except contained in the building code period. The reason I do that is because absent that the county or whatever jurisdiction it is can basically write their regulations and obviate ours, and we are supposed to be the agency responsible for that. Do I have any support for that?

MS. TOWNE: Yes.

MR. IFIE: When it says building code, when it comes to the state building code, it issues jurisdiction. Each county adopts their own.

MS. TOWNE: Yes. Well, they adopt the state, they adopt the national uniform building code and then local government municipality adopts the state code.

MR. IFIE: Can they also in addition to --

CHAIR LUCE: I don't want the local government to be able to go beyond it because you could come into a situation where you'd say, well, UBC says this for seismicity, but -- well, basically if we have the language after (4), you don't have a Council standard. You have a Council standard unless the county or local jurisdiction has decided they will set a higher standard. They could set a higher standard to provide no certainty, and then it might be adopted to prevent siting a power plant.

MR. IFIE: The small standard was already set. Each county right now has their own building code which is their modification of the state building code.

CHAIR LUCE: May have.

MR. IFIE: May have. In most cases they do. So the question is are we going to be or is EFSEC proposing superseding the county's building code?

CHAIR LUCE: Yes. That's what the statute says.

MR. IFIE: Are we going to be consistent? We're saying in this case now are we going to use that fish and wildlife and all the other ones as well?

MS. TOWNE: Noise is the next one.

CHAIR LUCE: Noise is the next.

MR. FIKSDAL: Well, let's back up here a little bit. If the county or city were to have a more restrictive building code than the state code, would the Council want to look at that and consider it as an appropriate building code to measure against the energy facility or? Are you just going to automatically say, "No, I am sorry. We don't care what the county or city does. It's the state that rules"?

CHAIR LUCE: We are not saying that. The legislature says that we are the one-stop shopping preeminent, and that's –

MR. FIKSDAL: And you can choose to do what you want then.

MS. TOWNE: We can consider anything if we have the time and inclination and want to bill the applicant.

CHAIR LUCE: I can't buy into letting the local jurisdiction veto.

MR. FIKSDAL: That isn't a veto.

CHAIR LUCE: Yes, it is.

MR. FIKSDAL: Basically what you're doing is you're deciding or opting that if there is a building code that the local government has passed that all energy facilities have to meet, whether they're EFSEC oriented or not, are you going to write this rule so that it's only the state building code that you're going to have the facility built to and not the local one?

CHAIR LUCE: I would say yes.

MR. FRYHLING: You want to take off the last three words of that section that it says whichever is more restrictive and just put state building code or local jurisdiction building codes. You put which is more restrictive, then they're dictating what you're going to put in there.

MS. ESSKO: Is the issue one of flexibility?

MR. FIKSDAL: No.

MS. ESSKO: Yes, we don't want the local government to dictate. Putting that aside, do you want to leave the Council's flexibility to go with the local building code when it wants to?

MR. FIKSDAL: I guess my concern is that we don't, the Council doesn't go out and say, "I don't give a damn what the locals have. We're going to go with the state, and that's the standard, and that's the way we go." What I would prefer, and I think the Council should be a little more --

CHAIR LUCE: Politic?

MR. FIKSDAL: Politic and just recognize that local jurisdictions have the building code that they have adopted for some reason, and that the Council should truly consider that and maybe even use it.

CHAIR LUCE: Allen, if you do that, there's not a standard. The standard is whatever the local building code is.

MS. TOWNE: And they can change it to foreclose all power plants.

MR. FIKSDAL: They can't change it. They're not going to change it. They could change it to all power plants.

CHAIR LUCE: Right.

MS. TOWNE: See, my problem comes in the next section, noise. All local government has to do, and I've seen them do it on other issues, is set the noise standard dBA from midnight to 5:00 a.m. at 40. You're done. End of story. No power plant. And if they can do it to foreclose power plants, and if we're going to site them statewide, then we can't have, we can't acknowledge that sort of action.

CHAIR LUCE: The EFSEC statute was passed to recognize that there's a preeminent state interest in the siting of power plants. Now, you may agree with that or you may disagree with that, but that's what the legislature said. So if you're to have standards, and if they're going to mean something, then you've got to identify what the standard is. It's not it will be this standard unless it's something else. An example in the air. Now there is no question in the air standard, we said federal or state standards. We didn't say or subject to whatever the local jurisdiction standards are. So there's also a matter of consistency here. With respect to the air, you're really clear. But with respect to seismicity, which is earthquakes, quite frankly I don't care if the plant

falls down or not as long as the public interest isn't hurt. It ought to be state building code, Allen, and I know that's a change from the past.

MR. FIKSDAL: No, not necessarily. I guess I have a hard time thinking that local government is going to pass an ordinance or a building code that says all energy facilities have to meet this certain restrictive building code.

MS. TOWNE: Build to 8.5.

MR. FIKSDAL: Where it could say it will be different than other industrial.

MS. TOWNE: It very well could.

CHAIR LUCE: We've seen it. We have examples of it before us right now.

MS. ESSKO: Is the way out through SEPA?

MR. FIKSDAL: No, it's not a way out. It's more of a philosophical opinion.

MS. ESSKO: But if they've adopted something that on its merits is a good thing and is better than the state standard, is the solution to have recourse back to the purpose section where you, if through SEPA, it shows that you needed a more stringent standard?

MS. TOWNE: For the public interest and health and safety data.

MS. ESSKO: Does that help?

CHAIR LUCE: Thanks, Allen. I really feel that if you're going to have a standard you have a state standard. We've been recognized by the legislature as being an agency which was created because there is a compelling state interest in siting power plants. If that's true, then we ought to go with what the state standard is. And if something comes up through SEPA, then it comes up through SEPA.

MR. IFIE: One thing I'm thinking about is right now, we did this for local agencies to local authority to the extent regulations make sense. I'm now looking at Mike. Don't we go to the counties for building permit type certifying?

MR. MILLS: The counties, they do code compliance, building code compliance inspection.

MR. IFIE: We don't tell them that. We don't tell them that, no, we can't go with their code because your code is too stringent compared to the state standard or the state building code.

MR. MILLS: They look at the plans that the company presents, and I'm trying to think of a thing that's kind of along the same lines. Satsop has to be built -- what is it, Allen? -- Zone 3.

MR. FIKSDAL: Whatever Grays Harbor was.

MR. MILLS: Whatever Grays Harbor was because it's a seismic sensitive area, and that's what the state building codes/local codes require.

MS. ESSKO: Is there an implementation issue that's separate from what we've been talking about because it's the state building code and not the local building code, you won't be able to rely on the local folks to do the building?

MR. MILLS: No. We would direct which codes the project would fall under. Through our interagency agreement with them we would direct them. Again, whatever we site, that's what they need to inspect to.

MS. ESSKO: They're not so different -- I mean they can pick one and both work equally well.

MR. MILLS: They're 99 percent going to be the same. If they're not, they should show up at the hearing and tell the Council something that is different.

CHAIR LUCE: Or offer comments in the SEPA process that demonstrates there's really a significant adverse impact locally.

MR. MILLS: Because the company in the application has to define the project they're going to build, and they would touch on this area of the standard. And if someone has an objection, a local official, then they ought to be telling us.

CHAIR LUCE: So my strong recommendation is compliance with the standards contained in the state building codes.

MR. IFIE: I agree now.

CHAIR LUCE: If something else comes up in SEPA that's significant, hey, bring it on in.

MR. FIKSDAL: You don't want to say or local?

CHAIR LUCE: No.

MR. FIKSDAL: So then it's going to be only the state building codes.

CHAIR LUCE: Yes.

MR. IFIE: I think that makes sense now as long we can impose that with SEPA.

MR. FIKSDAL: I don't like that at all.

CHAIR LUCE: Well, I know you don't like it, Allen.

MS. TOWNE: Okay. Then look at Sub 2 given this modification.

MS. MAKAROW: Actually that Sub 2 --

MS. TOWNE: It doesn't make sense.

MS. MAKAROW: The intent was to actually strike Sub 2 and move to application requirements into WAC 463-42.

MS. TOWNE: So we want to just take it out here and move it.

CHAIR LUCE: Move it where?

MS. TOWNE: To application.

MS. MAKAROW: To application requirements.

MR. IFIE: Before we move it though, we should probably put that in front of state building code just to clarify.

MS. TOWNE: Yes.

CHAIR LUCE: Correct.

MS. TOWNE: Well, we can leave in that applicable code because that may relate to zones. I don't know how the state code is set up, but it may have its own high, medium, low risk or whatever.

CHAIR LUCE: Noise.

MR. FIKSDAL: What did we just change?

CHAIR LUCE: We are going to move Sub 2 into the application.

MS. TOWNE: So we're going to delete the number one.

MR. FIKSDAL: So the standard is that one sentence.

MS. TOWNE: Yes.

CHAIR LUCE: Ending with code period.

MR. FIKSDAL: The first code.

CHAIR LUCE: Right.

MR. MILLS: Let me read from the Sumas SCA. Sumas building structures and pipelines shall be designed to be constructed and consistent with the requirements found in the City of Sumas construction codes or ordinance building codes, building codes to include the uniform building code. And it references sections of the uniform building codes, so you have acknowledged it.

MR. FIKSDAL: Every application that's ever been approved has been under the local government's building codes.

MS. TOWNE: For seismicity.

MR. FRYHLING: But what you're trying to accomplish here is a standard, so you don't have to write something similar or different for each one of these.

MR. FIKSDAL: But what we've tried to do is tell the local government, "Look. We recognize that you guys have a building code, and it's an appropriate building code." We work with the local governments.

MS. TOWNE: Allen, that's a different matter than seismicity. Yes, you have to have a local building code for side yard setbacks and nuisance fencing and all the other things that go into a building code to get a building permit or an occupancy permit. That's separate from seismicity.

MR. MILLS: Here's what you said on seismicity. At a minimum the facility shall be designed to comply with Seismic Zone 2 standards of the uniform building codes.

MS. TOWNE: That's the state.

MS. ESSKO: What do you do with building codes then. Because you've preempted all that? You've got a rule that preempts, that reiterates the statutory preemption of all the local government building codes.

MS. MAKAROW: We don't.

CHAIR LUCE: Okay.

MR. FIKSDAL: In certain site certification agreements we say it like that.

MR. MILLS: This is pretty much standard.

MR. FIKSDAL: Standard for Chehalis, Satsop, Sumas.

MS. TOWNE: There you go. You don't go to the local building code for your seismicity issues. You go to the state uniform building codes.

MR. MILLS: For that issue I think that would be right.

MS. TOWNE: So right now what we have before us here is seismicity, so let's solve that and then we will get to the local building codes.

CHAIR LUCE: Well, if we don't have a standard for local building codes, then the local building code is whatever the local building code is in terms of side yard setbacks and otherwise.

MS. TOWNE: But I don't think we've mentioned it.

CHAIR LUCE: No. And we've said expressly that these standards only govern those issues on which there is specific declaration. In the absence of that --

MS. TOWNE: Whatever is, is.

MR. MILLS: They have to list all the permits that are required, and that gets you to their statutory or regulatory basis. In the application they list all those. Some of them will touch on areas here. Some are outside of these areas.

MS. TOWNE: And we say something to the effect that we will consider or, I can't recall the language.

CHAIR LUCE: I think we're silent.

MS. TOWNE: On all those listed permits there's a reference to it and what we do.

MR. FIKSDAL: In the site certification you do reference back to those listed.

MR. MILLS: And then you look at the list and you make those mesh up.

MR. FIKSDAL: I agree with the seismicity standard. It's fine.

CHAIR LUCE: Thank you. Before you leave, Tony, because we're going to try and wrap this up today, noise limits. I would say the same issue is presented in noise limits. Chris has articulated why it's presented in noise limits because somebody can set a standard that says can't operate during the hours the 10:00 a.m. and 7:00 a.m. unless blah-blah. So I was trying to find where it is.

MR. FIKSDAL: It's right past seismicity.

CHAIR LUCE: I know that.

MR. FIKSDAL: So it basically reads energy facilities don't meet the minimum noise established under the blah-blah-blah.

MS. TOWNE: You can't go yet. Can I back up? We have this issue on DNR, and I don't want to let Tony go until we've dealt with it.

CHAIR LUCE: Okay.

MS. TOWNE: Back in January, Cherry Felix from DNR sent a memo to Allen saying these are the SEPA comments on our proposed rules for 463-XX. We encourage EFSEC to consider the level of protection afforded by the Forest Practices Act and Rules when reviewing all projects on privately owned and state managed forest lands in the state. In the fish and wildlife section it's unclear about riparian areas, critical stream sites, water quality section, and on water quality issues are waste water discharge, surface water runoff, and sedimentation to water, and what have you. The question I place before the group is do we want to cite to the Forest Practices Act and Title 222 WAC.

MR. FIKSDAL: As a standard?

MS. TOWNE: As a standard. Now we don't do it for the hydraulic permit requirement. We don't do it for other things. Whatever the law is is and presumably it would be one of those things listed under other permits and requirements. So should we? Should we not? How strongly do you feel about it, Tony? Did you know about this?

MR. IFIE: I knew about it.

CHAIR LUCE: I think we should leave forest practices up to the local jurisdiction.

MR. IFIE: No, I don't.

MR. FIKSDAL: That erases what Jim just said in the last 15 minutes.

CHAIR LUCE: I'm trying to have a little humor here, Allen.

MS. ESSKO: The difficulty with both this and the building code issue is you have a rule that we talked about today that says EFSEC has preempted everything. So there is nothing else left out there unless you in a rule want to carve it out and we're going to allow the local governments to keep issuing building permits. We're going to let somebody else keep doing forest practices.

MS. TOWNE: We are talking about standards. Remember noise is a statute. Noise is a WAC, and we have it here because that's what we have decided to impose on ourselves as a standard against which we'll measure the application. So do we want to add the Forest Practices Act and WAC to that list that we're going to pay attention to? I am neutral on the subject, and I ask Tony.

MR. IFIE: I mean the way we have done it in the past is we've deferred to the other agencies that have different rules and we consider that rule and try to comply with them as much as we can. Like in Chehalis there was a problem -- was it Chehalis or Satsop? We had a problem with sand and gravel at the site that needed surface mining permits. Do you recall that?

MR. MILLS: Oh, yes.

MR. IFIE: All that we're concerned about is the amount of sand and gravel that was to be removed from the site. In that case all we did was make sure that the applicant met with DNR representatives and worked out the issue where it wasn't a big deal for the applicant to comply, so they complied. It seems to me isn't that how we have been doing it in the past, EFSEC trying to consider the permitting requirements and attempting to comply? Aren't those preempting?

MS. MAKAROW: Well, yes. Another good example was the dam safety permit that was required for the berms in the Wallula Power Project where I think basically we worked with the agency involved through a contract to determine whether the substantive compliance aspects of those regulations or laws are being met by the applicant or not.

CHAIR LUCE: Well, again, the Purpose section of this 001 says compliance with the standards shall satisfy in their respective subject areas, so we're not addressing that. Therefore, if we're not addressing that specifically, we haven't specifically set forth a standard. Therefore, we would work with DNR, Department of Natural Resources or hydrology or other areas.

MR. FIKSDAL: Chris's question is should we have a standard or not for forest practices? Any of these that came up, this seismicity, noise were essentially two big issues in Sumas, and that's why they're in here. We're fighting the old battle.

MS. TOWNE: And this DNR one came from a SEPA review.

CHAIR LUCE: And it never came up.

MR. FIKSDAL: It's never been an issue before.

MS. TOWNE: Fine with me.

MS. ESSKO: So consider whether you need to go back and change 463-14-050 which says 80.50 operates as a state preemption of all matters relating to energy facility sites.

MR. FIKSDAL: I think that's still okay. You're preempting, but then you're basically saying in your SCAs if you need to do a forest practice or if you need to cut down trees, go consult with DNR, and they'll work with you. It's EFSEC's authority still.

MS. ESSKO: Yes. You just can't say because we didn't deal with it in this chapter that we're talking about, end of discussion, because you still have this other issue over here in preemption where you affirmatively --

MR. MILLS: We're directing them to the rules that they should follow.

MS. MAKAROW: But we've also broadly addressed the other permits issue in 42 where staff is suggesting the addition of a section called Other Permit Applications Required.

MS. TOWNE: That's the one I was thinking of, yes.

MS. MAKAROW: And in Sub 2 that says the applicants may be required to submit applications for other state permits or authorizations identified in their list of permits, and to work with EFSEC staff to get the right information submitted.

MS. ESSKO: Right. Right.

CHAIR LUCE: So let me just clarify on noise, to jump back to noise. Sorry. Sit down.

MR. IFIE: I need to go.

CHAIR LUCE: Sit down. We're going to delete the last sentence in the event that a local government jurisdiction adopted an ordinance more restrictive than state. We're going to go with the state noise standards. Agreed?

MR. IFIE: Agreed.

CHAIR LUCE: Agreed, Chris?

MS. TOWNE: Agreed.

CHAIR LUCE: Dick?

MR. FRYHLING: Yes.

CHAIR LUCE: Tim?

MR. SWEENEY: Yes.

MR. CARELLI: Jim, could I comment there?

MR. MILLS: No, you can't.

MR. CARELLI: You could have a case where local jurisdiction has preexisting development with a noise level of 30 and somebody wants to come into the middle of that and put in a power plant that would then just meet state standards.

CHAIR LUCE: Right.

MR. CARELLI: As opposed to the local standard. You would have all sorts of problems.

CHAIR LUCE: Why?

MR. CARELLI: By putting a noise emitter in the midst of receptors that have a lower standard.

MR. FIKSDAL: In other words, the development around someplace has grown because there was a standard and they thought the noise was only going to be 30. Let's say that's what the local requirements are, and now an energy developer wants to come in and plop this energy facility there.

CHAIR LUCE: In the middle of my residential neighborhood.

MR. FIKSDAL: And noise standard for that is 40, and you've already had all this development when they went in because the local government said, well, gee.

CHAIR LUCE: That's why we have the State Environmental Policy Act, and if it turns out, for example, in the hypothetical that you're posing, Chuck, then I would say it may be a good case of doing something that's in addition to the state standard.

MS. TOWNE: Through SEPA.

CHAIR LUCE: Through SEPA.

MR. CARELLI: Is that something that would be picked up in SEPA?

MS. TOWNE: Sure. Noise is a major subheading of the environment.

MR. SWEENEY: It seems to me that it wouldn't be noise that would be the only problem.

MR. FIKSDAL: No, you could get into a whole bunch of problems.

MR. SWEENEY: If noise was the only problem maybe I could see it.

MS. TOWNE: Let me give you a hypothetical. The Veteran's Home at Retsil. You've got 500 extremely elderly and ill people, highly sensitive receptor, high volume of receptees and you want to put a power plant in.

MR. FIKSDAL: I don't think they could hear anything.

MS. TOWNE: That's right. But that would be an example of where the SEPA process would certainly surface that issue, and we could mitigate for that specific situation and receptor.

MR. FIKSDAL: By exercising your authority under SEPA.

MS. TOWNE: Right, so long as we have noise here. Now another question. Here's one for you, Ann. SEPA Analysis. Can we mitigate under SEPA for noise that is otherwise permitted under the state noise standards? And usually it has to be a policy in the agency SEPA ordinance, and if our SEPA ordinance references this chapter, it will just say state standards. I'm not sure we can mitigate below the state standard. This is an interaction of the noise law, the SEPA law, EFSEC jurisdiction, and I question how far you can go under substantive SEPA mitigation.

CHAIR LUCE: Well, let's deal with the standards here today. You've raised this issue in the past. It's a good issue.

MS. TOWNE: And it still needs consideration.

CHAIR LUCE: I understand that, and we will have to deal with that maybe in the SEPA rules.

MS. TOWNE: Okay. I have one more thing on that same performance or noise thing. It says noise levels as they exist now or are hereinafter amended and, other requirements contained herein. This chapter doesn't have any hereins to contain.

MR. FIKSDAL: Well, that was because it was going to follow along with a whole bunch of stuff.

MS. TOWNE: Then I'd put period after amended and delete the rest.

MR. FIKSDAL: Okay.

CHAIR LUCE: You could do that, yeah. You could do the same for seismicity, but that's fine. The rest of this stuff has been deleted. It's been moved to the application section

MR. FIKSDAL: Well, let's see. There's another section.

MS. TOWNE: Line 15, on Page 3, you have a fragment with nothing following it that I could find.

MR. FIKSDAL: Well, yes. That's what I was looking at, maybe there wasn't anything.

MS. TOWNE: There wasn't anything.

MR. FIKSDAL: We just forgot.

MR. MILLS: We just didn't take that out.

MS. TOWNE: Okay. Zap.

MR. FIKSDAL: Some of this I don't remember. Did we move the noise stuff? We moved some of it.

MS. MAKAROW: What we moved was what information would be required in the application, so part of the application is an assessment of what the background noise atmosphere is and the modeling that shows what the impacts are.

MR. FIKSDAL: Chuck, you're the main author of this noise thing. I hope you're not too angry with us.

MS. TOWNE: He doesn't have a vote anymore.

MR. CARELLI: I don't have a vote anymore, Allen.

MR. FIKSDAL: But you worked hard on these. I don't want to slight Mr. Carelli here.

CHAIR LUCE: We won't slight Mr. Carelli.

MS. TOWNE: On Page 9, Line 37, this is fish and wildlife, and we lost the heading, and this may be a fragment that got moved somewhere else. Tell me this would be 2(a)? It would be (a)(b)(c)(iii).

MR. MILLS: You go back to Page 7.

MS. TOWNE: But that got deleted.

MR. MILLS: Yes.

MS. TOWNE: So I thought maybe it got moved.

MR. FIKSDAL: It should be 60-030.

CHAIR LUCE: Fish and wildlife.

MR. FIKSDAL: Although before you start numbering these things, Jim had the need for power one that needs to get in here in the numbers somewhere, and I don't care where it's put in. Does any order make any difference to anybody?

CHAIR LUCE: No.

MR. SWEENEY: Once you get it done, we probably will.

MR. FIKSDAL: So that would be for now, according to the index, it would probably be 040.

CHAIR LUCE: Is that Need for Power?

MR. FIKSDAL: Fish and Wildlife. All these are going to have to be renumbered, whatever it is.

CHAIR LUCE: Right. It starts with the intent. The Council's intent is to achieve no net loss.

MR. FIKSDAL: Yes.

MS. MAKAROW: Actually I think it starts with the first sentence of purpose at the bottom of Page 7, which reads purpose of section establishes standards and requirements for preservation and mitigation of the fish and wildlife areas associated with energy facilities, and then it goes into the intent.

CHAIR LUCE: Right. It goes into all of that. So it goes on to say this rule blah-blah-blah and then it picks up again on the bottom of 9.

MR. FIKSDAL: Yes.

CHAIR LUCE: Where it says intent, "The Council's intent...", so there was an inadvertent deletion is what you're saying of 463-040?

MR. FIKSDAL: Yes.

CHAIR LUCE: So the introductory and then -- okay. Got it. I had a question, Chris. Help me out here. Mitigation credits and debits shall be based on a scientifically valid measure of habitat value of area. It goes back to --

MS. TOWNE: This is words of art and it's to avoid HEP. Remember HEP from Bonneville?

CHAIR LUCE: All right. Strike the comment. Let's move ahead.

MR. SWEENEY: I don't.

MS. TOWNE: You don't want to know. It's too ugly. It's one of several complex federally different measures of habitat, what it is, what it does. And it is not the gold standard. It is simply one group of scientists favorite, and in order to avoid -- one of the original drafts had HEP, and there was a strong urge to avoid HEP and we put the substantive words in, what we want to achieve, and HEP is simply one of several paths to salvation which we don't want to get locked into. This is a way to avoid it.

CHAIR LUCE: We avoided my science is the best science; your science is junk science. Basically that's it.

MR. SWEENEY: What's HEP stand for?

MS. TOWNE: Habitat Evaluation Program or procedure or something.

CHAIR LUCE: Okay. Where do we go from there? Onto Page 10, the ratios.

MR. FIKSDAL: Keep going. Wetland survey is required. Then I guess does it end there? It ends.

CHAIR LUCE: It looks like it did.

MS. TOWNE: At the top on Page 10, Line 9, "As required by Chapter 463-42" which is this chapter, "at the application shall..." That should be in the application section. It doesn't belong here in the standards, I don't think.

MR. FIKSDAL: Okay.

CHAIR LUCE: Good catch.

MS. TOWNE: Then you might check back in the application to make sure it's there.

CHAIR LUCE: Definitions. Where do we go to now?

MS. TOWNE: We go to Page 15, Line 41.

CHAIR LUCE: Why did we delete water resources? I'm not against it. I'm just trying to figure out why.

MR. FIKSDAL. Because we looked at it, and it didn't seem to be a standard. It seemed to be a process more than a standard. Especially I think we put this in the application because a lot of it had to do with Ecology and submitting something to Ecology and getting something back from Ecology.

CHAIR LUCE: My only recollection was we had an extensive discussion with Ecology and other stakeholders about water rights in particular and how to resolve this issue. So if it's just -- I don't mean to demean it, but if it's in the application, that's not a standard.

MS. TOWNE: There aren't any standards to water rights. Either your application meets the state law on water rights or it doesn't. We can't impose any other standards.

CHAIR LUCE: The only thought I had, and Allen and I talked about this briefly, was maybe we should enter into a memorandum of understanding or agreement with Ecology relative to how we determine how water rights are determined and their use for energy facilities. There was a legal end of this argument about who issues water rights.

MR. FIKSDAL: The agreement was that EFSEC wasn't going to issue water rights because that was a can of worms that nobody ever wants to get into.

MS. TOWNE: Good call.

MR. FIKSDAL: But there was a process for an applicant to demonstrate that they have sufficient water, and they were going to go to the Department of Ecology and the Department of Ecology was going to do whatever it's called.

MR. CARELLI: Report of Exam.

MS. TOWNE: Investigation, Report of Examination.

MR. FIKSDAL: Then they come to the Council with the report of examination.

CHAIR LUCE: And if they couldn't do it, then the applicant could retain an independent person to do it.

MR. FIKSDAL: None of that is a standard.

MS. TOWNE: No, it's a process.

MR. FIKSDAL: It's a process. And we describe it in the application section as if you need water and your application demonstrates that you have done all of this, and then you come to the Council with all that stuff as part of the application requirement. That's what I saw.

MS. TOWNE: I concur with leaving it out.

CHAIR LUCE: I'm fine with that. The only thing I would like is some sort of agreement, a formalized MOU or something, over time with Ecology that sort of memorializes the discussions we had in terms of how the process is going to work. Does that make sense, Chuck?

MR. CARELLI: It does. You could probably take much of the text here, put it into a memorandum of understanding, and send it to Ecology and Hedia could probably get a sign-off. Because I know, and right, wrong, or otherwise, everybody that worked on this at Ecology is now retired.

CHAIR LUCE: Wow. Let's start over then.

MR. FIKSDAL: You and who else?

MR. CARELLI: Mike Harris who was the principal negotiator.

CHAIR LUCE: Do we do that?

MS. TOWNE: I think we should.

CHAIR LUCE: And staff, not immediately but soon.

MR. FIKSDAL: Thank you. Remind us sometime in the future.

CHAIR LUCE: Environment, Aesthetic and Other Benefits 080. I don't get what we were trying to do below, Line 50.

MS. MAKAROW: I think our staff's intent was to strike that.

CHAIR LUCE: We can strike that.

MS. TOWNE: What were you going to strike?

MR. FIKSDAL: That whole section.

CHAIR LUCE: 080.

MS. TOWNE: Good. Go for it.

CHAIR LUCE: Including the words "I don't get what we're trying to do below."

MS. TOWNE: Yes.

CHAIR LUCE: Sneak into the draft rules.

MR. FIKSDAL: I think that was Chris's original remark in there, too.

MS. TOWNE: Yes.

MR. FIKSDAL: So 080 we're doing away with.

CHAIR LUCE: There was a paragraph that remained on waste water discharges.

MS. TOWNE: Yes, and I have some heartburn about this.

MS. MAKAROW: Actually the policy section that was starting at Line 15 was supposed to get stricken.

CHAIR LUCE: Oh, okay. That's fine.

MS. MAKAROW: There's also one update that did not get caught in here. We also included a reference to the federal Clean Water Act.

MS. TOWNE: There's also something at the end of the first paragraph, Line 14, Subsections 4, 5, and 6 below which have disappeared.

MR. FIKSDAL: Right. We'll get rid of that.

CHAIR LUCE: Well, on one, then where it starts out waste water discharge as from energy facility projects shall meet or --

MS. TOWNE: Or exceed.

CHAIR LUCE: I would put shall meet the requirements of state water quality standard.

MS. TOWNE: Right, period.

CHAIR LUCE: Well, not period, but shall meet the requirements, and then it goes on in Chapter 173, etc., etc.

MR. FIKSDAL: So it's just the first sentence which is a long sentence.

MS. ESSKO: Just take out *or exceed*.

CHAIR LUCE: Right.

MS. TOWNE: Then after the "and" on Line 10 is the punch line. One would presume --

MR. FIKSDAL: We want *to leave or exceed* in because we don't want to say "are better."

MS. ESSKO: I mean the federal line has all that anti-degradation stuff.

MR. FIKSDAL: I mean if they're better you have to make them go back and meet exactly what it says in the standard?

MS. TOWNE: That's a problem.

MR. FIKSDAL: Well, you can say *or exceed*, so they can be better.

MS. TOWNE: Okay.

MS. ESSKO: I mean, Chuck, having an anti-degradation is a key component of water quality law, right?

MR. CARELLI: It is, and in one sense if the standard is 7 and the existing water quality is 8 purer than 7, then 8 is the standard.

MS. TOWNE: But preceding water quality governs.

MR. CARELLI: Yes.

MS. TOWNE: You're not licensed to degrade existing quality.

MR. CARELLI: That's right. And I don't know. Before you took out "or exceed," I'd go back to Ecology and get some clarification.

MR. FIKSDAL: I would leave exceed in.

MS. TOWNE: If we are going to leave in *or exceed*, then do we need to say "and shall not result in degradation of the quality of the water in the State of Washington or have significant adverse impacts on environment or human health?"

MR. FIKSDAL: Sure. Keep that in.

MS. ESSKO: Aren't those two separate -- it's been a while, but is 173-210A, aren't those like numerical standards, and that's separate from the surface water standards or am I totally off base?

MS. TOWNE: In the Class A, B, C receiving water rankings?

MS. ESSKO: Don't those two concepts deal with two different facets of the program?

MS. TOWNE: Ambient and discharge?

MR. FIKSDAL: Ground water and surface water, is that what you're asking? Are these ground water and surface water, two different water quality standards?

MS. ESSKO: Yes. I thought the degradation piece dealing with the quality of the waters of the state was a separate concept. Because I was thinking that maybe the first part of it dealt with not surface water quality but what was in the effluent itself.

CHAIR LUCE: You're way beyond my segue.

MS. ESSKO: Well, I didn't think so. I was just remembering that this causes problems.

MS. MAKAROW: I'll check what the cites are and make sure that we've got the right one in here.

MR. CARELLI: What you might want to do is include the cite in state water quality standards and for the ground water quality standards to make sure they're both correct. 173-200 just doesn't sound right, but I don't know.

CHAIR LUCE: I guess I don't have a problem with sticking in some really good adverse impacts on the environment, but I thought that would be covered under SEPA up front anyway. I know it feels good to say that.

MR. FIKSDAL: I guess I would agree if there's a period after Washington.

MS. ESSKO: Check with somebody at Ecology who knows the water program, and I think those may be three separate concepts in water quality law.

MR. FIKSDAL: A period after Washington?

CHAIR LUCE: Yes, period after Washington.

MR. CARELLI: You might get that from Sue Mauermann.

MS. ESSKO: She's not there anymore.

MS. MAKAROW: She's not at Ecology.

MR. FIKSDAL: She's my boss now.

MR. CARELLI: That being the case --

MR. FIKSDAL: Yes, we can ask Sue. I will see her tomorrow.

CHAIR LUCE: And then we're deleting the second paragraph that starts policy.

MS. MAKAROW: Yes.

CHAIR LUCE: What's the next one?

MS. TOWNE: It's on Page 20, air quality standard, which seems to be repetitive.

MR. FIKSDAL: There are two of these. It's doubled.

CHAIR LUCE: Delete the first. I thought 100 at the bottom was the one that we were going with, but maybe I'm wrong.

MS. TOWNE: Where is the air?

CHAIR LUCE: It's at the end of the chapter.

MS. ESSKO: There's two of them. One right after another.

MS. TOWNE: Oh, okay. I thought that the second one was better than the first one.

CHAIR LUCE: Right, so did I. It's clearer.

MR. FIKSDAL: Yes.

CHAIR LUCE: So delete the paragraph above and go with 100, the second one.

MR. FIKSDAL: The one and two. And then what we don't have in here is need for power.

CHAIR LUCE: Right.

MS. TOWNE: And we don't have the wind power guidelines.

MR. FIKSDAL: Let's talk about that first.

MS. TOWNE: The wind power guidelines were promulgated by the Department of Fish and Wildlife, but they were not enacted in WAC. It was a negotiated settlement amongst wind power

producers, environmentalists and the Department of Fish and Wildlife. So it was issued, promulgated, in August '03. And when you're doing a wind project, if you follow those guidelines, your mitigation proposal will be accepted by Fish and Wildlife, at least in theory. So they're a standard of sort. Do we want to incorporate them by reference or do we want to mention that they're out there and that applicants proposing a wind project -- not that they aren't going to know about it but for alerting the public, should we reference them?

MR. FIKSDAL: Yes, the latter.

MS. MAKAROW: I've done that in 42.

MS. TOWNE: Where?

MS. MAKAROW: 463-42, Natural Environment. At the end I have "the applicant shall give due consideration to any project type specific guidelines established by state and federal agencies for assessment of existing habitat, assessment impacts, and development of mitigation plans. The application shall describe how such guidelines are satisfied." So because there could be different types of guidelines developed for all kinds of different facilities the question remains whether you want to spell that out.

MR. FIKSDAL: You could give examples. Maybe you might give an example in that.

CHAIR LUCE: In 42 it's in here.

MR. FIKSDAL: For wind or combustion turbine or something, at least to get the word wind in there somehow.

MS. TOWNE: I will leave it in staff's hands, and that is the end of mine.

CHAIR LUCE: The last one is Need for Power.

MS. TOWNE: Yes.

CHAIR LUCE: I would propose we put what we had in the draft which is applicants for site certification energy facilities complying with the standards set forth in this chapter are not required to demonstrate a need for power and Council shall not consider the question of need for power in site certification proceedings. I think the last half might even be unnecessary. But if we don't say it, somebody is going to say, "Well, Okay. Applicants don't have to, but we can." So I wish there wasn't a need to say that, but I think in the past it's come up.

MS. TOWNE: Where do you propose to put it?

CHAIR LUCE: Wherever Allen wants to put it.

MS. TOWNE: Is it a negative standard?

CHAIR LUCE: No.

MS. TOWNE: Is it something that goes under the hearing process?

CHAIR LUCE: I guess I would put it --

MR. FIKSDAL: I would put it right after Purpose.

CHAIR LUCE: Right.

MR. FIKSDAL: Between Purpose and Seismicity, get it up front.

CHAIR LUCE: Are you okay with that?

MS. TOWNE: Oh, yes.

CHAIR LUCE: Tim?

MR. SWEENEY: Yes.

CHAIR LUCE: Okay. 24 and we're done.

MR. FIKSDAL: It's 42. Remember we were going to do the easy ones first?

MS. TOWNE: That's right.

MR. FIKSDAL: The short ones first.

CHAIR LUCE: Let's talk about the organization here because it seems to me like a lot of what's in 42 in fact has been taken from other rules because they really weren't standards in the classic sense of the word and put into an application format; is that right?

MR. FIKSDAL: Correct. Requirements of an application or what an application should contain.

CHAIR LUCE: I have a few specific comments, but I would support the reorganization in the manner it's been done. It seems to me it's a logical way to proceed. A lot of these things are.

MR. FIKSDAL: One of the things there's the title for Chapter 42. I don't think these are guidelines. I think these are -- are they requirements or is it a guideline?

CHAIR LUCE: Okay. Requirement.

MR. FIKSDAL: I'd just say instead of being requirement, just take procedure for application for site certification.

MR. SWEENEY: Just procedure, not contents?

MS. ESSKO: Applications for site certification?

MR. FIKSDAL: Okay. Applications for Site Certification. It's a great title. It just keeps getting tighter and tighter. One more time it would just be one word, site.

MR. SWEENEY: Site Certification.

CHAIR LUCE: I am just going to start turning pages until somebody tells me to stop.

MR. SWEENEY: It sounds like a good plan to me.

CHAIR LUCE: I'm on Page 8, and I'm ready to go to 9.

MS. TOWNE: Wait a minute. Wait a minute. Okay. I have a bunch of stuff on numbering and what have you. I'll just give them to Allen.

CHAIR LUCE: Page 8.

MR. FIKSDAL: Numbering is very problematic. Essentially we're just going to defer to the code reviser.

MS. TOWNE: Who will do it its own way anyway.

MR. FIKSDAL: Yes.

CHAIR LUCE: Page 8 going? Page 9? Page 10? The only thing I had on Page 10 was form and number of copies. I would insert lined paper. I really would like these applications on lined paper, so that we can follow them.

MR. SWEENEY: You means lines or numbered?

CHAIR LUCE: Excuse me. Lines, yes. Just like a five cent tablet in first grade.

MR. FIKSDAL: The application may be easy to have numbered pages, parts of the application. Many parts are reports and graphs.

MS. TOWNE: And they run landscape.

MR. FIKSDAL: So it would be very difficult to do that.

MR. SWEENEY: Aren't you referring more to the testimony that you want?

MS. TOWNE: Briefs.

CHAIR LUCE: Strike that. I will pass on that. Anything else on Page 10? Page 11, General Mitigation Measures.

MS. TOWNE: 105. You changed s-p-a-c-i-a-l to special, but I think it should be spatial, s-p-a-t-i-a-l. I think that's what you're talking about.

CHAIR LUCE: Where are we?

MR. FIKSDAL: Line 41.

CHAIR LUCE: Oh, I see. I had going back up above, on the page above on this same page, 085, Fair Treatment: The application blah-blah-blah, socioeconomic group, bear a disproportionate share of the -- I'd just put environmental or socioeconomic benefits.

MS. TOWNE: Impacts.

CHAIR LUCE: Impacts, excuse me.

MR. SWEENEY: But take negative out.

CHAIR LUCE: Take the negative out.

MS. TOWNE: There's another one down in the next new section, Sub 2, second sentence. "The application shall also set forth information for contacting local race ethnicity and socioeconomic status." Something is wrong.

MR. FIKSDAL: You need a comma?

MS. TOWNE: No. You don't contact a status.

MS. ESSKO: Where are you?

MS. TOWNE: Line 34. "An application shall also set forth..."

MS. MAKAROW: It says for contacting local interest and community groups to allow for meaningful involvement of all people. So there is a line that got cut. It should say, "The application shall also set forth information for contacting local interest and community groups to allow for meaningful involvement of all people regardless of race, ethnicity, or socioeconomic status."

CHAIR LUCE: All right. Agreed? Applications for Expedited Process.

MR. FIKSDAL: This is a new section. We didn't have anything in there for expedited processing.

MS. TOWNE: I had a problem here down in Sub 3. "The applicant shall submit a request for expedited processing." It looks like it's a mandate, and I think it ought to read at the applicant's option or something may submit. If he's going to do it, he has to do it now. But this implies the way it reads that he has to do it period, whether he wants to expedite it or not at the time. Unless you think that the title request for expedited process --

MR. SWEENEY: A request for expedited process shall be submitted at the time.

MS. TOWNE: That would make sense.

CHAIR LUCE: Let me ask a more basic question than that. What would happen if you do the preliminary study, you do the application, and you don't submit an application for expedited processing, but in the course of processing the application you find this is ridiculous? Why wouldn't you allow later application for expedited processing based on the event that may come to the Council's attention? I guess what I would just say is the applicant shall submit a request for expedited processing and knock out at the time of the application. I think it's highly unusual that would ever happen, but I can visualize a circumstance where you get down the road and gosh.

MS. TOWNE: It's a no brainer.

MS. ESSKO: How about this? (3) Request for expedited processing: Request for expedited processing shall be accompanied by a completed environmental checklist blah-blah-blah.

CHAIR LUCE: That would be great.

MR. SWEENEY: And not put a time frame requirement on it.

CHAIR LUCE: Right. Under 95 percent of the circumstances it will be at the time of the application, but it might not be.

MR. SWEENEY: If they don't submit it with the application, and they submit it at some other point, what's the big deal?

MR. FIKSDAL: Ann, if we do it your way or what you're suggesting, backing up to Jim's point, if an applicant is going to submit an application, they have to do a checklist at a very minimum. And in most cases even before they come in we're going to have talked with them and decided

essentially either they're going to submit a checklist and apply for an expedited processing or not. Because then if they're not going to apply for expedited processing, you know that we are going to do an EIS. The whole point is later you just don't submit a checklist. You can go back and request it. But I understand what you're saying, but I think it's probably not very --

MR. SWEENEY: Is the point of our section here to require them to lay out the timing of the request, or is it to lay out what should be in the request for expedited processing?

MR. FIKSDAL: We didn't have anything that dealt with expedited processing, so we're trying to figure out what.

MS. MAKAROW: Actually this came out of the expedited process. We have a chapter on expedited processing, so it came out of there and got slightly reworded to be wedged into this chapter. So I think there's the intent for both. That is, if they want expedited processing, they have to submit that request at the time of their application, and their request has to contain da-da-da-da in addition to the application.

MR. FIKSDAL: The question is does that foreclose anybody that had not submitted for expedited processing from requesting it at a later date?

CHAIR LUCE: You would get that argument potentially from someone who said you didn't follow your own rules. Your old rules are very express, clear, and unambiguous. It says at the time of the application. I suppose the only way you could get around it is if you didn't do it. The only way you could get around that is if you could submit a new application or an amended application. But rather than try and go through gyrations, just say they've got to submit, and they will be able to submit along the lines that Ann was suggesting here.

MR. SWEENEY: I have another issue. I mean on Sub 1 you're talking about contents and then in Sub 3 you talk about the contents.

MS. MAKAROW: Well, it's different. There's the contents for the application, and there's the contents for the request for expedited processing. So there's a difference between an application for expedited processing and a request for expedited processing.

MR. FIKSDAL: Well, if you're making a request, it should say certain things, but the application essentially is the same.

MR. SWEENEY: Application for?

MR. FIKSDAL: The big book.

MR. SWEENEY: Okay. Well, why are we telling them the contents of the application when that was dealt with?

MS. TOWNE: It's not an application for expedited processing. It's an application under pursuant to. I think it's the "for" that's misleading. Really you should renumber so the request comes first. Wouldn't that make sense? First, you ask if you can do it, and then we'll tell you how to do it.

MR. FIKSDAL: So three goes into number one essentially.

CHAIR LUCE: Right.

MR. FIKSDAL: Then two, three. Okay. Let us look at it. We'll work on it.

CHAIR LUCE: All right. Flipping pages again, Page 13, Page 14.

MS. TOWNE: Yes, I have one on 13, and it's a moldy, oldie section, 155. "The applicant shall discuss the criteria utilized as well as..." Utilized for what, pray tell?

MS. MAKAROW: Energy transmission system.

MS. TOWNE: Then go down to 625, the next one down. "Shall identify criteria used in transmission route selection, construction factors, design, etc." Are they two different things?

MS. MAKAROW: Yes. First, is the towers and the line, and the second one is the route.

MR. SWEENEY: It should be clear about that.

MS. TOWNE: Well, you're describing the routing on 155.

MR. SWEENEY: You're describing routing and construction design.

MS. TOWNE: Maybe it's a distinction without a difference.

MS. MAKAROW: Actually, energy transmission systems, I think those are the pipelines and the associated pipelines.

MS. TOWNE: To me it's transmitting energy which means electric which means lines.

CHAIR LUCE: It could mean gas.

MS. TOWNE: I immediately thought of power transmission.

MR. FIKSDAL: But under our definition, transmission system includes pipelines.

MS. TOWNE: Well, it's obscure.

CHAIR LUCE: Let's put it out there and see if somebody rises up and bites then.

MS. TOWNE: All right. I don't care.

MS. MAKAROW: Under our law transmission facility is defined as the pipelines. Electrical transmission lines fall under No. 6 which is associated facilities.

MR. FIKSDAL: It still doesn't --

MS. TOWNE: I still don't see how reading these I wouldn't think that 625 applied to the same thing that 155 applied to, but I'll leave it to you guys.

MR. FIKSDAL: Let's just leave it. It's too hard.

CHAIR LUCE: Amended section, Proposal - Water Supply.

MS. TOWNE: That's where we have all this stuff.

MR. FIKSDAL: Yes.

CHAIR LUCE: Okay. It looks to me that is pretty well covered as long as we do the MOA. Fourteen. Going on from 14 to 15. Going on from 15 to 16. Going on from 16 to 17.

MS. MAKAROW: Actually before we go onto 16 and 17, I have a question for Chuck. We weren't quite sure why there was a distinction with regards to POTWs under characteristics of aquatic discharge systems?

MR. CARELLI: What line are you on?

MS. MAKAROW: If you go to Page 15, Line 23, we had a section that read, where discharge is to an existing municipal water system the application shall identify connection point configurations including, and all of those things. And we didn't quite understand why that would be required for a municipal waste water system but not for some other waste water system.

MR. CARELLI: I don't know. The POTWs certainly should have been fresh in my mind given all that happened out at Satsop.

MR. FIKSDAL: So do you think it's okay deleting that sentence, just making all those requirements for any discharge system? It doesn't matter if it's POTW or not?

MS. TOWNE: POTW, Publicly Owned Treatment Works.

MR. FIKSDAL: POTW.

MR. CARELLI: I think that it would be okay, yes.

MS. MAKAROW: Thank you.

MR. FIKSDAL: That's what I like, a definitive answer.

CHAIR LUCE: All right. Page 15 moving ahead to 16. Here anything on 16? Nothing 16, going to 17.

MS. TOWNE: On 17, 225(5), I would insert at the beginning of Sub 5 in the case of a fossil-fueled plant just to clear clutter because the next one is the case of a nuclear-fueled plant.

CHAIR LUCE: It's fine. I think it's all right as it is, but if that clarification is helpful to you.

MR. SWEENEY: Yes. Because they had it for a wind application and you just said no emissions and moved on in their application.

MS. TOWNE: You can do that, but since we had it in the next once, I thought, well, let's make it.

CHAIR LUCE: Okay. So what's your insert?

MS. TOWNE: Just using that wording, "in the case of a fossil-fueled plant."

CHAIR LUCE: Okay. All right. Anything else on 17? Going to 18. Eighteen going once, twice. Page 19 anything critical on 19? Page 20?

MS. TOWNE: Yes. 322(5), Ground Water Movement/Quantity/Quality. As I'm sure Chuck will verify "describe existing ground water movement quality and quantity on or near the site in the vicinity of any points of the withdrawal." In places in Eastern Washington where you've got 400 feet of basalt and nobody has dug a test well, this could be really difficult. Are we sure we know what we're asking? Chuck, do you have any -- I just remember my pollution board cases where you would have dueling geologists for three weeks of testimony and nobody knew what was down there unless somebody dug a lot of wells.

CHAIR LUCE: How about shall if feasible?

MS. TOWNE: I just want to temper it.

CHAIR LUCE: If feasible?

MS. TOWNE: I don't know. Let Chuck tell us. I'm just very nervous about this in Eastern Washington. When you have well logs around, but there are vast areas without it. Your dry wheat country, who knows?

MR. CARELLI: I'm thinking something, you know, even the Starbuck site --

MS. TOWNE: That's available information?

MR. CARELLI: -- had available ground water information and low lying ground water as opposed to --

MS. TOWNE: Maybe you could provide information, known available, reasonable, feasible.

MR. FIKSDAL: Well, I think I would like to keep it the way it is. If the applicant wants to ask either for the waiver or describe that in the application, say the nearest ground water is 300 feet below the surface and there are no reliable well logs, then they'll have to come and say it.

MS. TOWNE: Rule of reason?

MR. FIKSDAL: Rule of reason, yes.

CHAIR LUCE: I'd go with that.

MS. TOWNE: Okay.

MR. FIKSDAL: Because I think that's going to be the exception rather than the rule.

MS. TOWNE: Oh, agreed. But not where they're putting stuff.

MR. FIKSDAL: I've rather have a stronger one than a weaker one.

MS. TOWNE: Yes. All right.

CHAIR LUCE: Page 20 going to 21. Page 21 going to Page 22.

MS. TOWNE: Twenty-one, the section below replacements, Line 7. Applicant shall provide the following information for the project area. All habitat areas within 300 feet of the project area. Okay. I can fix that. Never mind. Down there in (h), Line 40.

MS. MAKAROW: No, I think it was this section, the long section on Line 21 is actually replaced by what is on Page 22.

MS. TOWNE: Oh, yes. My question on 22 was, is this going to be eliminated?

MR. SWEENEY: Actually, it's the other way around then.

MR. FIKSDAL: Irina.

MS. MAKAROW: I think there is some confusion as to what's kept. Okay. Let's see.

MS. TOWNE: Which is it?

MR. SWEENEY: I think she's figuring it out.

MS. TOWNE: See, the header says it replaces all new language added to 332, so I assumed what was on Page 21 stayed.

CHAIR LUCE: I defer.

MS. MAKAROW: No, it is the part on Page 21 that is eliminated. That is what we had before, and it is the part on 22 which is being suggested as its replacement.

MS. TOWNE: Okay. Good.

MS. MAKAROW: So it starts at "The application shall describe all existing habitat types," Line 30 on Page 22.

CHAIR LUCE: Page 22 going to 23. Twenty-three going to 24.

MS. TOWNE: Okay. On 24 -- see, I was comparing 24 to 21. So I guess maybe we don't have as much of a problem. I just wanted to make sure we weren't being repetitive, so I will have to go back and reread it. I'll wait until the next time.

CHAIR LUCE: 24.

MR. FIKSDAL: You notice down in Page 24, about Line 34, we talk about Department of Ecology guidelines and stuff, so if we have to go back into what Irina is talking about the wind guidelines, we should add -- that's an example of what we've done.

MS. TOWNE: Right. Shall be prepared. That's not a suggestion. That's a directive, mandatory. Read the words.

MR. FIKSDAL: Do you want that?

MS. TOWNE: Fine with me. They might as well because they will just get killed someplace along the line if they don't, but then I think the wind power stuff deserves equal --

CHAIR LUCE: Billing.

MS. TOWNE: Yes.

CHAIR LUCE: Okay. Twenty-four going to 25. Twenty-five going to 26.

MR. FIKSDAL: Let's go back. Go back at Page 22 or back on Page 23 down on No. 5, Line 40. Irina, will you put something in there about wind, fish and wildlife wind guidelines?

MS. MAKAROW: Yes.

CHAIR LUCE: 24, 25, 26.

MS. TOWNE: Twenty-six bottom of the page. "Amount required/rate of use/efficiency - The applicant shall describe the energy and natural resource..." And I tried this. "Energy and natural resource rate of use and efficiency of consumption" because that's what you're talking about in your title about required rate of use and efficiency, so to tie it in with that title.

MR. FIKSDAL: Okay. Read.

MS. TOWNE: "Applicant shall describe the energy and natural resource rate of use and efficiency of consumption" -- "or rate and efficiency of consumption." Anyway I put it in here and you can take a look and play with it, but that was the thought. And then delete operation of the proposed facility period, and delete as rate of use and efficiency that you achieve during construction and operation.

MR. FIKSDAL: Give us your thing.

MS. TOWNE: Yes, I will.

CHAIR LUCE: We have got 26 going to 27. Twenty-seven going to 28. Twenty-eight going to 29.

MS. TOWNE: Twenty-nine, Line 15, the applicant shall identify existing parking areas or facilities and plans for maintenance and runoff control. I think runoff control should be in the surface water runoff or someplace. It seems odds to have it in your transportation section. It belongs in water quantity or surface water or something.

MR. FIKSDAL: I guess this is just to make sure that they're thinking of that in their parking plans.

MS. TOWNE: Okay.

MR. SWEENEY: It couldn't hurt.

MS. TOWNE: I guess. On Line 22, "The applicant shall describe the means proposed to ensure safe utilization of those areas under applicant's control on or in which." Oh, that just reads so funny. Where public access? Would "where" help clarify that sentence? So it would read "areas under applicant's control where public access will be granted." Well, I'll put it here and try it.

MR. SWEENEY: I think you're right.

MS. TOWNE: Down on Line 52, 51. Exposure to Health Risks, Subsistence Use of what? I presume it's Indians out harvesting Camas bulbs, but just standing there alone who's going to know what subsistence use is? And then it says "or visual and any measures designed into the project, if any, that would reduce potential impacts on minority ." Any other measures? Is this kind of the catchall?

MR. SWEENEY: Well, it's under description of impacts on low income.

CHAIR LUCE: This is where we worked the union workers in.

MS. TOWNE: Low income? Give me a break.

CHAIR LUCE: No, no, no. It would help raise the living standard for all low income workers if measures were adopted that this would be a union job.

MS. MAKAROW: I believe that what was in shading was suppose to be eliminated, was suppose to be deleted.

MS. TOWNE: Oh. I thought that was highlighted as new.

MS. MAKAROW: No, it was suppose to be deleted.

MS. TOWNE: Because you see the same highlighting is on the Letter E.

MS. MAKAROW: That was an edit that we did not catch.

MS. TOWNE: So you're going to get rid of that?

MS. MAKAROW: Yes, because we felt that would have been covered under the fair treatment section.

MS. TOWNE: Right. On D, on Line 47, average per capita and household. I assume you mean incomes.

MS. MAKAROW: Yes.

CHAIR LUCE: And actually work force. The characteristics of the work force and employment would be covered in Sub F. All right. We are going on to Page 30.

MS. TOWNE: I was having trouble reading (g) on Line 2. Monthly estimate, average size, projected construction, operational work force, by trade, and work force peak periods.

CHAIR LUCE: Which line?

MR. SWEENEY: Two and three.

MS. TOWNE: It just didn't track.

MR. SWEENEY: It's like work force peak periods is a whole different clause from the rest. You have average size of project construction and operational work force. "By trade" should

modify operational work force, and work force peak periods is a separate thought. So it would be project construction, operational work force by trade and work force peak periods.

MS. TOWNE: Okay. That's good. Thank you.

MR. FIKSDAL: Say that again, please.

MR. SWEENEY: Take the comma off of operational work force, put it between project construction and operational work force. So it reads project construction, operational work force by trade and work force peak periods.

CHAIR LUCE: Is work force a word?

MS. TOWNE: Yes. Line 49, resulting from the project and identify, I think. Sub 5, it's line 47. Application shall compare revenues and expenditures and identify any potential gaps because you don't compare the gaps, I don't think.

CHAIR LUCE: Okay. Done.

MS. ESSKO: Wait. Wait. Wait. Hold it. Sorry. Page 32, Top Rule, Sub 2. This is the issue about EFSEC's plenary authority to deal with permits. I want to make a proposal that the first sentence say -- let me just read it quickly once, and then I will go back and reiterate it if you're interested. "Pursuant to the Council's authority under RCW 80.50.110 and 80.50.120, WAC 463-14-050" -- those are the places we talk about preemption -- "the Council may require applicants to submit applications for other state or local permits or authorizations identified in WAC 463-42-685." And then the second sentence reads as it is.

CHAIR LUCE: That's fine.

MR. FIKSDAL: Can you give us that language.

MS. ESSKO: And one more thing. The rule that it's citing back to, 463-42-685, is back on Page 19, and there's a list in the application. The applicant has to list all the applicable federal, state, and local codes, ordinances, statutes, rules, regulations permits, and I would like to add, I suggest that you add "and authorizations" in each of those two sentences because that will loop in use authorizations. I'm assuming that you want to at least preserve your authority to issue a lease or right of way or easement over the objection of the state agency that has leasing authorities that does not want you to do that.

CHAIR LUCE: Right. So at least we have authority.

MS. ESSKO: So at least you have the authority. If it's okay, I would like to work with Allen on defining those two clauses to make sure they're perfect.

MR. SWEENEY: It's okay with me if you want to work with Allen.

CHAIR LUCE: We need to draw closure. I would propose a motion. I think a motion to adopt the draft rules as amended by today's discussion as Draft CR 102 Rules to be placed on the EFSEC website as such would be a good motion to have at this point in time.

MR. SWEENEY: I so move.

MS. TOWNE: Second.

MR. FRYHLING: Question.

CHAIR LUCE: All right. So the motion is that we will adopt the draft rules as amended by today's discussion as proposed CR 102 rules, place them on the EFSEC website as such. All in favor?

MR. SWEENEY: I just had a question. This doesn't mean we're actually formally going into 102. This is just kind of an airing out of it.

CHAIR LUCE: Actually what I would do separately or maybe as part of this motion would be to schedule a public meeting on the revisions, and we are not talking about schlepping all over the State of Washington here.

MR. SWEENEY: But we are not going to publish yet.

CHAIR LUCE: We are going to put them on the website as such. They will be proposed CR 102, so in a sense we've crossed over the bridge --

MR. SWEENEY: I know.

CHAIR LUCE: -- quite a bit further than we were before today, but we still have that additional time.

MR. SWEENEY: But we still have the ability to make revisions and modifications.

CHAIR LUCE: Right.

MR. SWEENEY: Yes.

CHAIR LUCE: All in favor say aye.

COUNCILMEMBERS: Aye.

CHAIR LUCE: Done.

MR. FIKSDAL: So what we'll do is get these changed, get them all revised, put them up on our website with a notice that says the Council has considered these and these are nearly the final --

MR. SWEENEY: Proposed CR 102. I like that.

MR. FIKSDAL: Proposed language that would be issued in a CR 102.

MR. SWEENEY: Okay. Great.

CHAIR LUCE: Good work.

MR. FIKSDAL: I had one other question. Chris, did you have some question about the -- my brain is gone -- Chapter 42, the --

MS. TOWNE: Fish and Wildlife?

MR. FIKSDAL: The outline structure. You wanted to reorganize 42?

MS. TOWNE: No, it's okay.

CHAIR LUCE: We're okay as we've done it.

MS. TOWNE: Yes, it's okay now that you've clarified the fish and wildlife mess.

MR. FIKSDAL: We're not quite done yet. Also, what we'll do is we'll rearrange it into Parts 1, 2, 3, 4, and 5 as much as possible.

MS. TOWNE: Good.

MR. FIKSDAL: The numbering may be all screwed up because we don't have the numbers and whatnot. Or should we wait for that?

MS. TOWNE: How are we going to get them?

MR. FIKSDAL: Should we just do these now on the web, so people can track what is existing?

CHAIR LUCE: I would do them now on the web, send them to the code reviser. At least get that process started. The code reviser is going to take a while to come back. He's going to come back with a draft. In the interim we're going to probably schedule -- I think we'll schedule a public meeting, discuss these. Then the public will be able to see them as the codes we have in place. If it's necessary to make further changes, we'll make and send them back to the code reviser for further revisions. Is that all right?

MR. FIKSDAL: Yes.

MS. TOWNE: Get the show on the road.

CHAIR LUCE: That is in addition to the already existing motion. Amendment to the motion, all in favor say aye?

COUNCILMEMBERS: Aye.

**NO.4: ADJOURN**

CHAIR LUCE: Thank you. Meeting is adjourned.

(Whereupon, the special meeting was adjourned at 4:15 p.m.)